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ARTICLE 134 OF THE UCMJ:
WILL AVRECH MEAN TAPS FOR THE GENERAL ARTICLE?†

I. Introduction

In the ten years since the United States Supreme Court's holding in *Bowie v. City of Columbia*¹ that the due process clause requires that a statute must give fair warning of prohibited conduct,² writers³ and courts⁴ have wondered whether Article 134,⁵ the General Article, of the Uniform Code of Military Justice⁶ met the *Bowie* test of fair warning. A recent case, *Avrech v. Secretary of the Navy*,⁷ has again focused on the question of vagueness and the Court of Appeals for the District of Columbia Circuit declared the first two clauses of Article 134 to be unconstitutionally vague when measured against the *Bowie* standard.⁸ The Secretary has appealed the decision and the Supreme Court has noted probable jurisdiction.⁹ The ultimate decision in the case could have profound effects on the administration of military justice.

This note will review the background of the General Article, discuss the *Avrech* case, explore possible alternative decisions by the Supreme Court, and consider the possible effects of a decision adverse to the Secretary.

II. Background

With but minor variations, the General Article has been a part of the law governing military personnel from the very beginning of our national existence;¹⁰ indeed, antecedents are found in British military law.¹¹ Prior to enactment in

† Subsequent to completion of this Note for publication, the United States Supreme Court decided *Parker v. Levy*, 42 U.S.L.W. 4979 (June 19, 1974), a case combined with *Avrech* for oral argument, in which it held that Article 134 was neither unconstitutionally vague nor overbroad. The Court upheld the validity of Article 134 where the conduct for which the appellant was convicted was clearly within the prohibition of Article 134 as limited by previous decisions of the United States Court of Military Appeals or listings in the Manual for Courts-Martial, 1969. A decision in the *Avrech* case was postponed.

1 378 U.S. 347 (1964).

2 *Id.* at 350.

3 See, e.g., Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. REV. 142 (1959); Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968).

4 See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1969): “. . . Article 134, already quoted, punished as a crime all disorders and neglects to the prejudice of good order and discipline in the armed forces. Does this satisfy the standards of vagueness as developed by the civil courts? . . .” No answer was given.

5 10 U.S.C. § 934 (1950) [hereinafter cited as the Article].

6 10 U.S.C. §§ 801-972 (1950).

7 477 F.2d 1237 (D.C. Cir. 1973).

8 *Id.* at 1243-44.

9 414 U.S. 816 (1973).

10 The earliest American forebear of the present General Article is Article 50 of Articles of War 1776:

All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion. Art. III of § XX, BRITISH ARTICLES OF WAR (1765).

11 See, Art. III of § XX, BRITISH ARTICLES OF WAR (1765).

1950 of the Code, there were two distinct bodies of law for the government of the armed forces, one for land forces and one for the naval forces. Each branch had its own version of the General Article.¹² When formulating one law for the governance of all military forces, Congress chose the wording of the Army version and reenacted nearly verbatim Article 96 of the Articles of War, 1916,¹³ into Article 134 of the UCMJ:

ARTICLE 134 GENERAL ARTICLE

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

Justifications for such a broad and inclusive provision are: the exigencies of battle, the need for flexibility in military commanders to insure discipline, and the holding of military personnel to a higher standard of personal conduct than their civilian counterparts.¹⁴ Even accepting these reasons as valid, the United States Court of Military Appeals recognized the potential abuse inherent in such a broadly worded rule. After enactment of Article 134, the court moved to narrow the range of its application.

The first limitation on the application of Article 134 was announced in *United States v. Norris*¹⁵ in 1953 and came to be known as the "pre-emption rule."¹⁶ The Court of Military Appeals noted that many charges specifically enumerated under other articles of the Code were for various reasons being brought under the *prejudicial to good order and discipline* or *service discrediting* clauses of Article 134 rather than under the more specific articles. The court denounced this practice:

[T]here is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. . . . We cannot grant the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.¹⁷

12 The immediate predecessors of Article 134 were Article 22, Articles for the Government of the Navy, Rev. Stat. § 1624 (1874) and Article 96, Articles of War, 1916, 64 Stat. 666.

13 "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such Court."

14 See generally, Wiener, *Are the General Military Articles Unconstitutionally Vague?* *supra* note 3.

15 2 U.S.C.M.A. 236 (1953).

16 See, e.g., Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, *supra* note 3, at 153.

17 2 U.S.C.M.A. at 239.

Accordingly, the court held that "Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the Punitive Articles."¹⁸

The Court of Military Appeals further restricted the application of the Article by its decision in *United States v. Holiday*¹⁹ in 1954. In order to clarify remarks made in earlier cases,²⁰ the court focused on the first clause of the Article which deals with "disorders and neglects to the prejudice of good order and discipline in the armed forces" and denied the application of the Article where the prejudice was too remotely connected to the disorders and neglects: "Suffice it to say that the Article contemplates only the punishment of that type of misconduct which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline."²¹

In spite of these attempts to tame the Article, it remains an elusive quarry. The General Article is employed by military courts to cover an ever-increasing variety of offenses.²² The most recent edition of the Manual for Courts-Martial provides form specifications for sixty-two separate offenses chargeable under Article 134.²³ A complete catalogue of these offenses is not practical here but a representative few will be mentioned to illustrate their scope. The first offense specified is "Abusing a Public Animal";²⁴ the last is "Wrongful Cohabitation."²⁵ Between these come such charges as "Bigamy,"²⁶ "Criminal Libel,"²⁷ "False Swearing,"²⁸ "Negligent Homicide,"²⁹ "Indecent Exposure,"³⁰ "Pandering"³¹ and "Stragglng."³² Furthermore, these sixty-two charge specifications are not exhaustive of the Article. In *United States v. Sadinsky*,³³ for example, defendant was charged under the Article that he "did wrongfully and unlawfully . . . through design jump from *U.S.S. Intrepid* into the sea,"³⁴ and was convicted. Defendant's counsel, in an attempt to get the Article 134 charge dismissed, urged that the court restrict the applications of the Article to offenses prohibited by some order, regulation or statute. In affirming the conviction of the Article 134 charge, the Court of Military Appeals considered the stated offense and concluded:

As the Government argues in its brief, an intentional, wrongful, and unlawful jumping into the sea from the deck of a carrier, could not possibly

18 *Id.*

19 4 U.S.C.M.A. 454 (1954).

20 *United States v. Snyder*, 1 U.S.C.M.A. 423 (1952); *United States v. Herndon*, 1 U.S.C.M.A. 461 (1952).

21 4 U.S.C.M.A. at 456.

22 The 1951 edition of the Manual for Courts-Martial listed significantly fewer charge specifications under Article 134 than the 1969 edition.

23 MCM 1969 (rev. ed.) A6-20-26.

24 *Id.* at A6-20.

25 *Id.* at A6-26.

26 *Id.* at A6-20.

27 *Id.* at A6-21.

28 *Id.* at A6-22.

29 *Id.* at A6-23.

30 *Id.*

31 *Id.* at A6-24.

32 *Id.* at A6-26.

33 14 U.S.C.M.A. 563 (1964).

34 *Id.* at 564.

have any result other than disruption of good order and discipline, not to mention the possibility of endangering the property and lives of others in rescue operations. . . . To superimpose a requirement that conduct be prohibited by some order, regulation or statute in order to fall within the proscriptions of the first category of Article 134 would be contrary to the clear and fair meaning of its terms. . . . Clearly, applying such a standard would effectively emasculate the very essence of Article 134 which is by definition intended, *inter alia*, to reach acts not otherwise covered but which are prejudicial to good order and discipline.³⁵

A feature of the application of Article 134 which merits discussion at this point is judicial creation of new offenses under the article by analogy to previous offenses. Though this practice in the civilian world was condemned by the Supreme Court in *Papochristou v. City of Jacksonville*,³⁶ its use is apparently still viable in military law.³⁷

The first two clauses of the General Article and its predecessors have been attacked for vagueness at various times before but have each time withstood the attack. Two cases on this issue of unconstitutional vagueness stand out and have been cited whenever the question has arisen. The first, decided more than 115 years ago, is *Dynes v. Hoover*.³⁸ There the Supreme Court discussed Article 32³⁹ of the Rules for the Government of the Navy,⁴⁰ a provision quite similar to Article 134:

And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment such as the 32nd article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are and how they are to be punished, is well known by the practical men in the navy and the army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognizance.⁴¹

Three years after enactment of the Code, Article 134 was attacked for unconstitutional vagueness in *United States v. Frantz*.⁴² The Court of Military Appeals upheld the Article:

We cannot ignore the conceivable presence of uncertainty in the first two clauses. Assuming that civilian precedents in the field are applicable in

³⁵ *Id.* at 566.

³⁶ 405 U.S. 156 (1972).

³⁷ This practice was denounced in *Avrech v. Secretary of the Navy*, 477 F.2d 1237, 1242 (D.C. Cir. 1973). This was not, however, a case where defendant was charged by analogy.

³⁸ 61 U.S. 65 (1858).

³⁹ "XXXII. All crimes committed by persons belonging to the navy which are not specified in the foregoing articles shall be punished according to the laws and customs in such cases at sea."

⁴⁰ Act of April 23, 1800, ch. 33, § 1, 2 Stat. 41.

⁴¹ 61 U.S. at 82.

⁴² 2 U.S.C.M.A. 161 (1953).

full force to the military community, we do not perceive in the article vagueness or uncertainty to an unconstitutional degree [I]t has been a part of our military law since 1775 and directly traces its authority to British sources. It must be judged, therefore, not *in vacuo*, but in the context in which the years have placed it Accordingly, we conclude that the article establishes standards well enough known to enable those within its reach to correctly apply them.⁴³

It is against the background of such judicial interpretations that the appeal of Private Avrech came to the federal courts.

III. *Avrech v. Secretary of the Navy*

While on duty in Da Nang, Republic of South Vietnam, in February, 1969, Private Mark Avrech, USMC, vented his feelings of frustration by typing a duplicating stencil very critical of the American involvement in the Vietnamese War.⁴⁴ Charges were brought against Avrech after he unsuccessfully tried to get another enlisted man to make copies of his statement.

In a court-martial on the charges of attempting to publish and publishing a statement disloyal to the United States, Avrech was found not guilty of publishing the statement but guilty of the attempt. He was sentenced to one month's confinement, reduction to the next lower rank, and forfeiture of pay for three months. The confinement was suspended and the balance of the sentence sustained by the Judge Advocate General of the Navy.⁴⁵

One year later, Avrech was given a bad conduct discharge after being found guilty of an unrelated offense in a second court-martial. The Navy Court of Military Review based its decision to award this discharge in part upon the fact of a prior conviction.⁴⁶ As a result of this, Avrech appealed the findings of the first court-martial in the federal courts, contending that Article 134 was unconstitutionally vague and overbroad under the fifth amendment, and that his statement was protected free speech under the first amendment.

The district court granted the Secretary's motion for summary judgment, finding the Article sufficiently definite to pass constitutional muster. On appeal, the United States Court of Appeals for the District of Columbia reversed⁴⁷ but decided only the fifth amendment issue.

In the comprehensive opinion, Justice Clark reviewed the background of Article 134 and noted that it has "expanded beyond all recognition"⁴⁸ and that new offenses against the Article may be created as the need arises.⁴⁹ Because of the expansion of the number of offenses within the purview of the Article and because the composition of the armed forces has changed in the last hundred years from a small professional group to one of great size with relatively few

43 *Id.* at 163.

44 The text of the statement is quoted in full by the court in 477 F.2d at 1239-40.

45 477 F.2d at 1240.

46 *Id.*

47 *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973) (opinion by Mr. Justice Clark, Supreme Court of the United States, retired, sitting by designation).

48 477 F.2d at 1242.

49 *Id.* at 1241.

career professionals, the court held that the conclusion in *Dynes v. Hoover*, namely, that the proscribed conduct was "well known by the practical men of the navy and army" was no longer applicable.⁵⁰

Turning to *Frantz*,⁵¹ the court plainly disagreed with the result of that case and denied that there is a "core of settled and understandable content through long tradition and the listing of the offenses in the Manual."⁵² The Secretary's contention that the Manual gave meaning to the Article by detailing specific offenses under its cognizance was also rejected, the court relying on *Sadinsky*⁵³ in holding that "the Manual is not exhaustive of Article 134 misconduct; its crazy quilt of offenses does not cover Article 134's bed."⁵⁴

Mr. Justice Clark did approve of the assumption in *Frantz* that civilian standards of vagueness do apply to the military,⁵⁵ but, in contrast to *Frantz*, he found that these standards, as set forth in *Bowie*⁵⁶ and subsequent cases, were not met in Article 134:

[T]oday Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities. . . . Indeed the only apparent purpose of Article 134 is to act as a catch-all for varied types of unforeseen conduct not otherwise covered by the Code.⁵⁷

IV. Alternatives on Appeal

The thorough and well-reasoned opinion of Justice Clark makes a formidable case for affirmance of the decision by the Supreme Court. However, if the Supreme Court believes, as Justice Holmes did in *Jackman v. Rosenbaum Co.*,⁵⁸ that a strong case will be needed to affect something practiced for over two hundred years by common consent, then there are two possible bases upon which the Supreme Court might build a decision to reverse. It can hold that either civilian standards of vagueness are inapplicable to the military or if civilian standards do apply, Article 134 and the Manual, when read together, state proscribed conduct with required specificity.

A. *Applicability of Civilian Standards of Vagueness to the Military*

The extent of application of the Bill of Rights to members of the armed forces has long been a subject of comment and controversy.⁵⁹ In the area of

⁵⁰ See text accompanying note 38 *supra*.

⁵¹ *United States v. Frantz*, 2 U.S.C.M.A. 161 (1953).

⁵² *Avrech v. Secretary of the Navy*, 477 F.2d 1237, 1243 (D.C. Cir. 1973).

⁵³ *United States v. Sadinsky*, 14 U.S.C.M.A. 563 (1964).

⁵⁴ 477 F.2d at 1242.

⁵⁵ *United States v. Frantz*, 2 U.S.C.M.A. 161, 163 (1953).

⁵⁶ *Bowie v. City of Columbia*, 378 U.S. 347 (1964). The Supreme Court's most recent articulation of the vagueness doctrine representing a synthesis of past teachings is *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

⁵⁷ 477 F.2d at 1241.

⁵⁸ 260 U.S. 22, 31 (1922).

⁵⁹ See, e.g., Note, *The Court of Military Appeals and the Bill of Rights: A New Look*, 36 G. W. L. REV. 435 (1967).

the fifth amendment protections, by the wording of the amendment itself, the right to a grand jury is expressly denied military personnel,⁶⁰ but other protections under this amendment have been applied by both Congress and the courts to members of the armed forces. Congress, for example, enacted Article 31⁶¹ of the Code which secures the privilege against self-incrimination, and, when the Code was enacted, was thought to be an even greater conferral of the privilege than was available to civilians.⁶² The strong concern of the courts in this area is evidenced by *United States v. Tempia*,⁶³ where in deciding a fifth amendment question, the Court of Military Appeals unequivocally stated that Bill of Rights protections were available to military personnel and that it was the duty of that court to follow the holdings of the Supreme Court insofar as they are not made inapplicable, expressly or by necessary implication, to members of the armed forces.⁶⁴

Do civilian standards of *vagueness* apply to the military? In *United States v. Frantz*,⁶⁵ the Court of Military Appeals assumed that civilian standards of vagueness applied in the military.⁶⁶ In *Avrech*, the assumption of *Frantz* was crystallized into a holding.⁶⁷ It would be in keeping with the recent trends of closer civilian court supervision of military proceedings and broader application of the Bill of Rights to military personnel for the Supreme Court to affirm this holding. But the statement of Chief Justice Vinson in *Burns v. Wilson*⁶⁸ stands as a warning to those who believe the Supreme Court's concurrence will be automatic:

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

60 U.S. CONST. amend. V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any persons be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

61 10 U.S.C. § 831 (1950):

Art. 31. Compulsory self-incrimination prohibited.

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

62 See Note, *The Court of Military Appeals and the Bill of Rights: A New Look*, *supra* note 59.

63 16 U.S.C.M.A. 629 (1967).

64 *Id.* at 633-34.

65 2 U.S.C.M.A. 161 (1953).

66 See text accompanying note 43 *supra*.

67 477 F.2d at 1243.

68 346 U.S. 137 (1953).

This court has played no role in its development. We have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands to meet discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.⁶⁹

Although it seems unlikely, the Court could seize upon the touchstone of "overriding demands to meet discipline and duty" and hold that civilian vagueness standards are not applicable to the military, thus upholding the General Article. However, the second possible basis for deciding to uphold the Article seems much more likely.

B. *Article 134 To Be Read in Conjunction with the Manual*

Article 36⁷⁰ of the Code empowers the President to prescribe procedure and rules of evidence for courts-martial. The end product of this delegation is the Manual for Courts-Martial. The current edition of the Manual was promulgated subsequent to the enactment of the Military Justice Act of 1968.⁷¹ Besides prescribing procedure, modes of proof, and rules of evidence, the Manual provides various aids to the practitioner. There are sections on constitutional and statutory provisions, forms for convening the various courts-martial, trial guides, and forms for charges and specifications under the Code.⁷² The Manual is freely available to every person at every military installation and it is intended that every officer should have at least a working knowledge of its provisions.⁷³

In Appendix Six to the Manual, all charges previously sustained under Article 134 are specified. Though the legal status of this section of the Manual is questionable,⁷⁴ the Court may hold that the Article cannot be interpreted in and of itself, that it must be read in conjunction with the gloss of history as provided in the Manual, and that this combination passes constitutional scrutiny.

The effect of such a decision would be to uphold the conviction of appellant Avrech because he was charged under an existing Manual specification, but would limit future use to items specifically listed in the Manual.

69 *Id.* at 140.

70 10 U.S.C. § 836:

Art. 36. President may prescribe rules.

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

71 82 Stat. 1335 (1968). This act amends the UCMJ and is codified in various sections of 10 U.S.C. §§ 801-937.

72 MCM 1969 (rev. ed.).

73 BYRNE, *Military Law: A Handbook for the Navy and Marine Corps* 9 (1970).

74 See generally, *United States v. Smith*, 13 U.S.C.M.A. 105 (1962); *United States v. Jenkins*, 7 U.S.C.M.A. 261 (1956); *United States v. La Grange*, 1 U.S.C.M.A. 342 (1952); *United States v. Lucas*, 1 U.S.C.M.A. 19 (1951).

V. Conclusion: Possible Effects of Affirmance

In the previous section possible alternative bases for reversing the decision of the Circuit Court of Appeals were discussed. If, however, the Supreme Court takes what seems the more likely route and affirms the lower court, some attention should be given to the possible effects this will have on the operations of the military and on the administration of military justice.

Several commentators have considered what the result would be if the military were to lose the General Article, but there has been no agreement as to how great a detriment the armed services would incur. At one end of the spectrum is Henry Bernays Wiener, former Special Assistant to the Attorney General of the United States, who is of the opinion that if the Article is stricken, then the military, whose law is that of instant obedience and whose purposes and institutions are completely different than those of the civilian world, will suffer greatly, and Congress' attempt to hold the military services to "a higher code—termed honor"⁷⁵ will have been futile. Opposed to this view is General Hodson, a former Judge Advocate General of the Army.⁷⁶ He believes not only that the Article is unconstitutionally vague, but also that the loss of the Article would be nothing more than an annoyance. He flatly states that the services "don't need"⁷⁷ the Article and contends that the defects of the Article can be eliminated without losing the benefits it provides as presently used. He would cure the problems of the General Article in two steps. First, since many of the charges now made under Article 134 are also covered by more specific articles, he would, wherever possible, require the charge to be made under the more specific provision.⁷⁸ As for those offenses which are within the scope of only the General Article, he believes these can be kept effectively curbed by forbidding them through properly disseminated lawful orders, the violations of which are punishable by a court-martial under Article 92⁷⁹ of the Code. His approach has the merits of doing all that Article 134 has previously done without the vagueness objections and requiring little or no congressional action to "patch up" the Code.⁸⁰ Shortcomings of the proposal are that the flexibility of Article 134 would be lost and that expanding the present use of Article 92 in this manner could subject that article to attack on vagueness and other due process grounds. It may well be that the second shortcoming will prove critical and extensive congressional action will be required to put the Code in order.

75 Wiener, *Are the General Military Articles Unconstitutionally Vague?*, *supra* note 3, at 363.

76 Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1 (1972).

77 *Id.* at 12.

78 *Id.*

79 10 U.S.C. § 892 (1950):

Art. 92. Failure to obey order or regulation.

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.

80 One area in which the Manual would require revision is in the Table of Maximum Punishments (para. 127c) to provide for the greater variety of offenses within the purview of Article 92.

As to the effect striking down Article 134 will have on the administration of military justice, one can only speculate. Good effects seem almost certain. At all levels, those who bring charges against others will be required to be more specific and precise; abuses of power and the charges of such abuse will become less frequent; members of the armed forces will enjoy rights and privileges more closely aligned with those of their civilian counterparts; the aura of second-class citizenship attendant to being a member of the armed forces will fade. On the other hand, some bad effects seem equally certain. Flexibility in military commanders will be impaired; and there will be bred constitutional tests of other articles, notably Articles 15 and 92, and possibly even of the concept of courts-martial itself. Such challenges would unsettle, at least temporarily, an area of the law which needs, more than anything, certainty.

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