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In the

Supreme Court of the United States

SECRETARY OF THE NAVY,

Appellant

vs

MARK AVRECH

No. 72-1713

Washington, D. C.
February 20, 1974

Pages 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

SECRETARY OF THE NAVY, Appellant	:	
v.	:	No. 72-1713
MARK AVRECH	:	

Washington, D.C.

Wednesday, February 20, 1974

The above-entitled matter came on for argument at 11:55 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C.
For the Appellant

DORIAN BOWMAN, ESQ., Rabinowitz, Boudin & Standard, 30 East 42nd Street, New York, New York 10017
For the Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1713, Secretary of the Navy versus Mark Avrech.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK,

SOLICITOR GENERAL OF THE UNITED STATES

ON BEHALF OF THE APPELLANT

MR. BORK: Mr. Chief Justice and may it please the Court, this case turns on the constitutionality of Article 134 of the Uniform Code of Military Justice. That article punishes, among other things, 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.

The Article entered our military jurisprudence when it was enacted by the Continental Congress in 1775 and has been reenacted repeatedly since then by Congress, the first reenactment occurring in 1806.

Apparently the men who wrote the Constitution had no doubt of its compatibility with this Article.

It has been in effect as an organic part of our military law now for just under 200 years and in our history, millions and tens of millions of service men and women have served under this Article.

It is as settled a piece of our jurisprudence, I suppose, as there is.

At stake in the constitutionality of this Article, of course, are several fundamental values of our society. Appellee, here, urges the values of fair warning and due process and free speech.

I will attempt to show that Article 134 is fully compatible with those values and does not threaten them. What must also be recognized, however, is that the judicial destruction of Article 134 would jeopardize two other important values in our society. The first, of course, is the effectiveness of American Armed Forces upon which the safety of the nation rests.

The second, however, is a value which I think is not sufficiently recognized and that is the importance of Article 134 in confining the role of the military in our national political processes and decisions.

Should speech of the sort involved in this case and in Captain Levy's case, which we argue next, come to be permitted in the military, there would be real danger that our military would become so unreliable as to frustrate civilian policy and to be unable to carry out civilian policy. But worse than that, it seems to me that there might be a danger of a politicized military establishment with all the dangers that prospect poses for the principle of

civilian control of the military.

This is speech in these cases in opposition to warrings and if it is permissible for a Pfc. and a captain to make these publications or attempt these publications and make these speeches under these circumstances, then I do not see why it would not be permissible, equally, for general officers and admirals to address their troops about their political views and about their disagreements with the President of the United States and about their disagreements with warrings.

We are not dealing with small issues in this case. The Appellee, Mark Avrech, brought this action in the District Court for the District of Columbia to expunge his courtmartial conviction which was under Article 80, which punishes attempts and the attempt was to violate Article 134 of the Uniform Code of Military Justice.

The District Court dismissed his suit, but the Court of Appeals reversed, holding that Article 134 was unconstitutionally vague.

The conduct underlying the courtmartial conviction occurred at the Marble Mountain Air Facility in Danang in Vietnam, where Pfc. Avrech was on active duty with the Marine Corps in a combat zone.

While on night duty, in the group supply offices at his base, Avrech typed up a stencil of a statement

entitled, "The Truth," and marked "Volume I, No. 1."

This statement is set out in full at pages 4 and 5 of the Government's brief and he intended to circulate it, he said, only to eight or ten of his friends in the Marine Corps.

The statement is a denunciation of the United States' military role in Vietnam and it contains such sentences as these: "Why should we go out and fight their --" the South Vietnamese -- "Why should we go out and fight their battles while they sit home and complain about communist aggession? What are we, cannon fodder or human beings?"

Going on, "The United States has no business over here. Are your opinions worth risking a court-martial? We must strive for peace and if not peace, then a complete U.S. withdrawal. We have been sitting ducks for too long."

The statement is more extensive than that and it is, in tone and, in substance, a denunciation, as I say, of United States' warrings.

I think that there is no doubt that had Pfc. Avrech succeeded in publishing that statement, the document would tend to create disaffection among the troops and it would certainly create lowered morale among troops in a combat zone.

Q Well, I suppose it might be reasonably said that it would stimulate some debate on the subject and you'd

have one group of soldiers one way -- or Marines -- on one side and another group on another side.

MR. BORK: It certainly would stimulate debate. I think that is certainly fair, Mr. Chief Justice. In addition to that, apparently, although he was not charged with it, the record in the case, the summary of the record in the case -- the original record of the transcript has been destroyed -- indicates that Pfc. Avrech constantly stimulated debate among his fellows about the wrongness of United States' warrings.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed.

MR. BORK: Mr. Chief Justice, and may it please the Court:

We were discussing at the lunch break the facts of this case.

Having typed up, on a stencil, his denunciation of the warrings of the United States for circulation to the troops -- and it was entitled, "Volume I, Part I" because Pfc. Avrech testified that he had intended to publish other such statements as his thinking developed along these lines -- having typed up this first statement, Avrech attempted to gain access to the supply office mimeograph machine in order to run the statement off and in the process, he showed it to a corporal who controlled the machine.

The corporal took the statement, gave it to a superior and, as a result, Avrech was tried before a special court-martial on charges of violating Articles 134 and 80.

The court-martial acquitted him on the Article 134 charge but convicted him under Article 80 which, as I say, punishes attempts to commit offenses and here the specification of the charge under Article 80 charged an attempt to commit an offense under Article 134, namely, an attempt to publish to members of the Armed Forces with design to promote disloyalty

and disaffection among the troops, a statement disloyal to the United States.

This charge required a finding of specific intent and was modeled on the standard form contained in the Manual for Courts-Martial.

Upon conviction, Averich was reduced in rank from Private first class to Private, sentenced to forfeiture of three months' pay and sentenced to one month's hard labor and confinement.

The commanding officer suspended the confinement. In all other respects, through the regular review process, the conviction and the sentence were affirmed, so that he received a rather mild sentence that did not put any bad conduct discharge on his record and did not confine him in any way.

The Appellee challenges this conviction under one Fifth Amendment doctrine, void for vagueness and two aspects of the First Amendment doctrine, overbreadth and the claim that the statement he attempted to issue was protected speech.

I think none of these contentions can withstand examination and I would like to examin e the vagueness point first.

Now, I think it is essential to realize that there is no doubt that a parallel statute applied to the

civilian population would be unconstitutionally vague. Nobody would know, in a free and permissive society, what was conceivably meant by something like disorders and neglect to the prejudice of social order.

The difference, of course, is that a civilian society is basically a free society. It is not -- and, furthermore, it has no single mission, unlike the military. The military society is an ordered society. It has a mission. It has a structure and for that reason, one knows what tends to detract from that mission, what tends to break down discipline and good order.

Now, counsel for the Appellee argue this case as if it did involve a statute applied to the civilian population and they refuse, I think, to face the only issue, the real issue, which is the military context in which this Article exists, indeed, of which this Article has been an organic part for 200 years and that is what makes all the difference in this case.

That context and the limiting constructions given by the United States Court of Military Appeals give Article 134 the definiteness it requires.

Q What did the Court of Appeals say about that argument of yours?

MR. BORK: The Court of Appeals thought that the military context did give it sufficient definiteness,

Mr. Justice Douglas, but I think I can demonstrate that it does.

One, it seems to me, extremely telling point in this case is that Counsel for the Appellee argued this case by a series of hypotheticals. Although this Article has been in use for 200 years, they do not cite a single case of injustice done by the military under this Article. They do not cite a single case in which convicted servicemen could not -- in which a convicted serviceman could have entertained any doubt that what he did was prejudicial to good order and discipline and that what he did was wrong and illegal so far as a military society was concerned.

Whatever superficial plausibility Appellee's challenge has is gained only by ignoring the meaning given by military function and context by ignoring the actual operation of the military system and arguing, instead, from wholly imaginary cases.

The Court of Military Appeals repeatedly said of this Article that it reaches only misconduct and disorders which are directly and probably prejudicial to good order and discipline so that the construction placed upon it by the Court of Military Appeals and followed by the courts-martial is that the tendency to injure good order and discipline must be direct and it must be obvious for a reasonable man.

In addition to that, of course, the Manual for Courts Martial, which is in the Appendix to our brief, discusses, at page 7, this Article and the specific charge of disloyal speech.

Now, knowledge of what conduct directly --

Q Listen, the average enlisted man is not familiar with the Manual at all, is he?

MR. BORK: Mr. Justice Marshall, I think that is quite true. The average enlisted man is not, although more enlisted men than one might think, are, particularly enlisted men who recognize themselves as coming into brush, possibly, with disciplinary authority.

Q Well, I wonder how many Manuals of Court Martial they had in Vietnam altogether?

MR. BORK: I do not know that. I do know, though, Mr. Justice Marshall, that the Articles of War -- the Articles appeared --

Q I am just wondering if you need that.

MR. BORK: Pardon me?

Q I am just wondering if you need that.

MR. BORK: Well, I don't need it, but I think I'd like to use it if I may. The Articles are explained to the troops as part of their basic training.

Q I see.

MR. BORK: The Manual is available and I would

suggest that the Manual is really as available to an enlisted man in the Marine Corps as is a criminal code of Illinois, say, to the man who gets into a brush --

Q The whole problem is if the Manual is explained to him.

MR. BORK: The Manual was explained --

Q He may not have the Manual itself.

MR. BORK: That is correct.

But aside from history and tradition, it seems to me that the most important and obvious fact about this case is that the military does comprise a specialized community. It has a well-understood and a specialized function which is something a civilian community does not have and the need for order and discipline in that specialized community is known throughout our culture and it is obvious to everyone.

[Q How many Manuals did you ever read?]

MR. BORK: It is also obvious what kinds of behavior tend to break that down.

Now, at this point, I would like to say that the military use of this kind of penal statute is by no means unique in our law. This is not confined to military law by any means.

Courts frequently apply standards of sort when they are given content by an understood function and although,

on the face of the words, they may seem vague, when they are in context, they are not vague and I think this is true in a variety of areas and I'd like to mention a few:

In the first place, and most obviously, the Sherman Act's vague criminal prescriptions against things like combinations in restraint of trade were upheld in Nash against the United States largely because -- Justice Holmes said because of the antecedent common law among other things. The antecedent common law really was not a great deal of help but in the -- he explained further in International Harvester against Kentucky that criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree and here, the matter of degree is what is an undue restraint of trade.

Because between the obviously illegal and the plainly lawful, there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust, the conditions are as permanent as anything human and the conditions there, of course, were the conditions of trade and economics.

Here, the conditions are omission of understood function of the military and the great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe.

That passage, I think, with any superficial alterations, could have been written in defense of Article 134 and Article 134, if I may say so, is, fi anything, clearer than the Sherman Act was before it received construction.

Q Mr. Solicitor General, you said a little earlier that your brothers have not pointed to any case where -- I don't know just how you put it -- I think where there has been any great injustice or, I think you said, where there wasn't fair notice, more or less. But, I, in looking at these examples in the Appendix of the Appellee's brief see -- some of them seem to me to be arguably, while they are all, of course, conduct falling below what we like to think of as ideal, some of them really have nothing to do with the good order and discipline of the Armed Forces, do they? I mean, obtaining telephone services from a telephone company with intent to defraud, for example, or negligent failure to maintain sufficient bank funds?

MR. BORK: May I speak to those?

Q Or even mistreatment of the members of your family, for instance, or refusing to testify at a coroner's inquest?

MR. BORK: I think that list in the Appendix, Mr. Justice Stewart, requires use with a great deal of caution. If you will look at those cases, and I am sorry to

say that I seem to have mislaid my analysis of them. A number of them, for example, are cases in which it was held that the behavior cited there was not a violation of Article 134. Those are merely cases where somebody was charged.

Q Well --

MR. BORK: And, in addition to that, for example, the --

Q You can argue that both ways, Mr. Solicitor General, as to the validity of this.

MR. BORK: Well, I think not, Mr. Justice Stewart, because if one looked at civilian jurisprudence and said, look at the number of cases in which people have been charged with murder and look how many of them were acquitted, one would not say --

Q No, but we know what murder is. It does involve killing another human being.

MR. BORK: Well, one of my examples here is manslaughter, which is, I suppose, a negligent killing under the circumstances.

Q Umn hmn.

MR. BORK: Is a quite vague criminal proscription. But I wish to say about this, for example, not only are some of these examples in the Appendix held not to be violations of Article 134, in addition, some of them are not described

fully enough: For example, cheating at bingo.

Q Yes.

MR. BORK: That was the gentleman who was calling out wrong numbers to rig the game with servicemen and then splitting the proceeds.

Q Well, I assumed it was something like that. That is the reason I didn't ask you about that one.

MR. BORK: Jumping off a ship, which sounds a little bit carefree, as a matter of fact, was a man who had made a large wager that he could do a backflip off an aircraft carrier in motion and cause the Navy to send a destroyer out to rescue him.

Q Umn hmn.

MR. BORK: These are cases, when you look at the full case, I don't think there is any case here in which it is is not -- in which a man was convicted -- in which it is not clear that he should have known that the conduct was to the prejudice of good order and discipline or that it would serve as discrediting in the eyes of the civilian population with which he was dealing.

Q Of course, any deviation from an ideal conduct by a man in uniform tends to bring discredit upon the uniform that he wears and the military organization to which he belongs. Isn't that correct?

MR. BORK: That certainly is correct, your Honor,

but any deviation from ideal conduct is not charged under this Article. It has to be a serious, direct, obvious impact upon -- prejudicial impact upon good order and discipline. Anyone who has lived among troops knows that if deviations from ideal conduct were prosecuted, that we would have nothing but courts-martial.

That is not the way this Article is used and I think some attention has to be given to the way this Article is used, and the way it is controlled by the Court of Military Appeals and, indeed, by the reviewing legal staffs that go over every one of these convictions.

But I have mentioned the vagueness of the Sherman Act, which was saved by its context and by our knowledge of economics -- the criminal offense of manslaughter, we rely upon common understanding of man as to what is dangerously negligent behavior in a vast multiplicity of examples that would be beyond the skill of a legislative draftsman to reach.

Now, if I turn to examples involving speech, I might mention that courts often permit indefinite wording if the context gives the wording meaning and a parallel example, it seems to me, is Grayned against City of Rockford and this Court there upheld a conviction under an anti-noise ordinance that published, "The wilful making of noise or diversion that disturbs or tends to disturb the peace or

good order of schools," interpreting with the reply the actual or imminent interference with peace or good order and relying upon the school context as giving meaning, the disturbance is impact upon the normal activities of the school.

The context there gave fair notice and I think the context in the military gives fair notice to a statute -- to an Article which is written very much like the anti-noise ordinance was in Grayned against the City of Rockford.

I might also suggest that courts regularly apply penalties for contempt of court. That would seem to be a fairly vague standard and it does inhibit speech quite directly but it is made sufficiently definite by the common understanding of the function of a court room, the function of the legal system and what that function requires in the way of good order and discipline by the part of attorneys who take place -- argue in the court room.

And, finally, I would like to cite as very close to this case the clear and present danger test. That is a test that is read into criminal statutes on speech about overthrow of the government or violence, advocacy of violence and, hence, it becomes a warning -- the clear and present danger test is a warning that must be intelligible to those the law threatens and in Dennis against the United States, this Court explained those words as follows:

It said that Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows:

"In each case, courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Then this Court said, "We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant and relates their significances. More, we cannot expect from words."

It seems to me that Article 13[4] is certainly no vaguer than that standard. I agree that "More, we cannot expect from words" in the context in which 13[4] is applied.

I think it does an equally good job of relating the factors and their significance.

And there is one other parallel I'd like to draw, that between Article 13[4] and the Hatch Act. This Court upheld the Hatch Act last term in Civil Service Commission against National Association of Letter Carriers and at this point, I am discussing not so much vagueness as overbreadth and the legitimate interest of Government.

This Court held, in a civilian context, that the legitimate interest of Government, in good government and in a

fair political process, was enough to uphold the Hatch Act's restrictions upon government employees' political activities against First Amendment claims.

So, here, I think, the legitimate interest in an effective military and in a military that does"... dictate civilian policy, either by becoming ineffective so that it cannot carry out policy or by becoming so politicized that it refuses to carry out the policy made by civilians," justifies Article 134's very limited inhibitions on speech, just as the Hatch Act was justified for parallel reasons.

In this case, I think it is obvious that the publication Avrech would have published would have tended to spread disaffection among troops in the combat zone and that cannot be tolerated by any effective military organization.

There may have been armies that tolerated that kind of behavior, but they were armies on the verge of dissolution and not armies that win wars and, aside from the tendency to disaffect others, statements such as these, even if they convince no one of a deleterious effect upon morale, because they signal to others that at least one man in the unit is not to be relied upon, he is already disaffected, and he may be unreliable in dangerous or difficult situations, which I think is surely a factor the military are entitled to take into account.

It is apparent, I think, that the Article, as

applied in this case, was not unduly vague, nor does it violate Avrech's First Amendment rights, since those rights must vary according to the time, place, and circumstances and speech of this sort in a combat zone can hardly be protected.

It might be different in other military circumstances. It might be different if he were in the States in civilian uniform talking to men off base.

In a combat zone, it cannot be protected speech, I would not think.

Q Doesn't the Court of Military Appeals apply the standards that this Court has applied in civil procedures, as respects vagueness?

MR. BORK: I think it does, Mr. Justice Douglas, but it recognizes that each of these standards has a slightly different application depending upon the context and the circumstances in which it must be applied.

Q Well, that would be true in the civilian branch of the law, too.

MR. BORK: That is true. That is true.

Q And the Court of Military Appeals has explicitly upheld the validity of Article 134, has it not?

MR. BORK: They have, indeed.

Q How recently?

MR. BORK: I think it has upheld it, Mr. Justice

Stewart, within the last year or two. I can get the citation for you, it's --

Q It's quite recently, in any event.

MR. BORK: Quite recently.

Q Is that the France case?

MR. BORK: I believe it was the France case.

Q Well, I have it here. I can give it to Justice Stewart.

MR. BORK: All right.

Q I take it that the major argument of yours is that because the Article has been construed so often and it has been held to include so many things that, at the very least, it should not be invalidated on its face.

MR. BORK: Well, I think that is an argument that I make and I think it should not be invalidated on its face, again, for two other reasons, not just because it has been construed so often.

One is because this article has its primary impingement upon conduct which is not speech.

Q And you say it should be declared invalid on its face in connection with any crime; it should be tested for vagueness as applied?

MR. BORK: That is correct. I think, as I say, for one thing, in the military so many aspects of human conduct are necessarily regulated that are left completely

unregulated in civilian life, it would be, I think, impossible to write a specific and definite code that covered all of the things that might prejudice good order and discipline, from speech to nonspeech.

That being the case, to strike down a statute like this on its face, I think makes no particular sense You'd have to strike down whatever replaced it, on its face because one would always be left with the need of some form of general article.

Q Oh, wherever it has been construed and applied and the conviction upheld, to that extent, meaning has been given to the Article.

MR. BORK: That is correct.

Q And any identical crime, any person committing an identical crime, would know in advance.

MR. BORK: That is correct, Mr. Justice White, but I would like to say that there are, in addition, areas that have not yet been applied in which it is still valid.

Q I understand.

MR. BORK: Like this one.

Q Why would always be left with a need of some general article? I understand, from reading these briefs, which was over the weekend -- I don't have it in mind, I think it was a former highranking military officer of the legal department who has written an article or given us a

a speech saying to the effect that we don't, the military doesn't need these.

MR. BORK: He did give that speech, Mr. Justice Stewart. I understand that -- I am informed that in the heated debate which followed his publication of that article, he recanted slightly.

Q Was he prosecuted under 134?

[Laughter.]

MR. BORK: That had not occurred to me, but it could be considered.

Q But in all seriousness, why do you say the military needs this?

MR. BORK: They need it, Mr. Justice --

Q I mean, we don't need it in civilian society.

MR. BORK: That is because civilian society --

Q Because you say it is diverse and permissive and free and the military is an authoritarian organization with a specific mission. I understand this, but why does that lead to the conclusion that you need a catchall thing like this?

What is wrong with spelling out what you don't want soldiers and sailors to do?

MR. BORK: Let me say this, Mr. Justice Stewart, addressing merely the speech area, I think that the numbers

of ways in which servicemen can find to prejudice discipline in nonspeech ways are limitless, but let's address just the speech area, which is only a minor part of this article.

One ranges from the serviceman speaking or discussing with two friends off base over a drink in somebody's livingroom out of uniform, the aims of the war in a discursive fashion, all the way through the wide variety of circumstances to the serviceman in a combat zone, perhaps in action, denouncing what they are doing and urging others to pull out of the action.

There are so many gradations and variations and alterations and circumstances between there, that I cannot imagine that one could draft specific articles that did not look like the code, the Internal Revenue Code and even then we know that the Internal Revenue Code has its areas of vagueness.

Q Well, Mr. Solicitor, on this one way, the urging them not to fight, wouldn't he be violating conduct in the presence of the enemy, which is a specific one?

MR. BORK: It certainly would, Mr. Justice Marshall.

Q And on all of those you have mentioned, specific ones that could be covered by a specific article.

MR. BORK: Well, I think there are too many. I think there are too many variations in circumstances.

Q In this particular case, if the commanding officer said, "Private, do not distribute that," and he distributed it, he would be charged with what?

MR. BORK: Distribution --

Q Disobeying an order.

MR. BORK: Article 90, that is quite true.

Q So he wouldn't have to go to this indefinite one here.

MR. BORK: No, that is quite correct, but this man --

Q In the first place, he could have said, "Don't use that mimeograph machine," that would be the end of it.

MR. BORK: Well, I hardly think it is practical, Mr. Justice Marshall, for the commanding officer to go about catching people, investigating people, to see what they were likely to publish and then issue an order not to do so.

Q I understood that was given to the commanding officer, this piece of paper.

MR. BORK: That is correct.

Q At that stage, the commanding officer could have said one of two things: "This can be mimeographed. It can't be distributed," or he could have ordered him not to distribute it and that would have been the end of it.

MR. BORK: That is correct.

Q But instead of that, you bring him in on this charge.

MR. BORK: But it would have to be --

Q And that is why it seems to me the availability of this is, if you don't want to go to the other one, well, we always got this one.

MR. BORK: Well --

Q Doesn't it look to you like it is the one where if I can't get you on anything else, I got you on this one?

MR. BORK: No, sir, Mr. Justice Marshall, it does not look to me like that. It looks to me like a necessarily general statement because it is impossible, in any length short of a tax code, which would not give notice to anybody in the enlisted level, to convey all of the instances in which the military may object to behavior as being obviously prejudicial to good order and discipline.

The argument you make, that the commander could have issued a direct order, is quite true, but that would be an argument that says, you may never punish for any attempt to do anything because when the attempt is discovered, the commanding officer may always issue an order not to do it and then if it is done, you may be punished for direct disobedience of a lawful order of a superior commissioned

officer but so long as the attempt article, Article 80, has any validity -- and I don't think it is questioned for this, it is valid, then an attempt may be punished although the commander could have overlooked it and just issued an order.

MR. CHIEF JUSTICE BURGER: Mr. Bowman.

ORAL ARGUMENT OF DORIAN BOWMAN, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BOWMAN: Mr. Chief Justice and may it please the Court:

The central question which this Court must face is the validity of Article 134. In the course of my argument I will indicate why it is necessary to reach that issue without regard to the specific conduct involved.

Now, at the very outset, the government argues that, balanced against the important -- admittedly important --

Q Mr. Bowman, you said we should reach it. How do you read what Justice Clark did in the Court of Appeals? Did he invalidate it on its face?

MR. BOWMAN: Yes, he invalidated the first two clauses, your Honor.

Q I mean facially.

MR. BOWMAN: Yes, I'm sorry, facially.

The government argues that balanced against the admittedly valid, admittedly important values of fair

warning and due process, one should balance the value of preventing politicizing the Armed Forces.

I want to make clear that, whether or not the Court upholds Article 134 has absolutely nothing to do with civilian control of the Army. If there is particular conduct that the Army is concerned about, then it should punish it under clearly existing and well-defined statutes or pass a new statute.

You cannot uphold an otherwise invalid statute just because you don't like certain behavior and it is --

Q Mr. Bowman, I wonder if I may interrupt you before you get fully launched on your argument on the merits.

It struck me there might be a question here about jurisdiction.

MR. BOWMAN: Well, I --

Q This isn't a habeas corpus case.

MR. BOWMAN: No, it's not.

Q And it wasn't a case for back pay in the Court of Claims.

MR. BOWMAN: No, if you are raising the collateral attack point, your Honor, this Court, as long ago as Smith v. Whitney, Dynes v. Hoover, Swaim v. United States, Ruckel v. United States, were all collateral attack cases. They were not habeas cases. Smith v. Whitney, Dynes v. Hoover were brought in the District Court, District

of Columbia, whose jurisdiction was the same as the District Court here when it was brought.

Furthermore, in this Court's case of Gussick v. Schneider, in footnote 3, although it was a habeas case, Gussick, the Court explicitly recognized in footnote 3 that collateral attacks could be brought by methods other than habeas and Mr. Justice Frankfurter, in Burns v. Wilson, concurring, also recognized the fact that collateral attacks could be brought.

I might say that the Government, you know, this issue has not been briefed here.

Q I know it hasn't.

MR. BOWMAN: It wasn't raised by the Government but I think what I have just said is sufficient answer to -- this Court has held that.

Q Well, collateral attack, but, I mean, that could be --

MR. BOWMAN: I'm sorry, it was collateral attack to set aside a court-martial conviction on the same grounds, Dynes v. Hoover, of course.

Q This was an action for a declaratory judgment, wasn't it?

MR. BOWMAN: Here?

Q This case.

MR. BOWMAN: Yes.

Q Filed in the District Court, District of Columbia.

MR. BOWMAN: Filed in the District Court, District of Columbia under -- well, we had jurisdiction under 11-521. Also we -- which did not, I might add, at that time require $10,000 jurisdictional amount. We also filed under 1331 and we alleged $10,000 controversy and that was never controverted and the question was never raised by the government.

Now, the suggestion that -- to this Court that in deciding --

Q Mr. Bowman --

MR. BOWMAN: Yes, sir?

Q Those cases you cite, certainly, Dynes against Hoover and of that vintage, there was no declaratory judgment statute made.

MR. BOWMAN: No.

Q They didn't uphold the bringing of it by declaratory judgment, did they?

MR. BOWMAN: No, but they upheld the method of attempting to declare the court-martial conviction invalid. I admit that the form -- I mean, we want --

Q What form is this?

MR. BOWMAN: Smith v. Whitney was a writ of prohibition, I believe, brought in the District Court. Dynes v. Hoover was a -- I'm trying to remember -- was a

collateral -- I frankly don't --

Q Generally, as we both know, the administration of justicd is quite unrelated to the civilian courts and generally the only place where there is an intersection of their jurisdiction is on a writ of habeas corpus attacking the very jurisdiction of the military court. Isn't that correct?

MR. BOWMAN: In --

Q Those are cases like the murdering wives cases and those.

MR. BOWMAN: Yes, but in Burns v. Wilson, it was not attacking the jurisdiction of the court, your Honor, nor was it in Gussick v. Schneider and this Court, in those cases, did not state and certainly did not hold that habeas corpus was the only method by which one could bring a collateral attack against a court-martial jurisdiction.

Our case goes to the very, you know, goes, quite obviously, to the statute itself under which the court was operating, that section.

Q Why didn't your client bring habeas?

MR. BOWMAN: Excuse me? Because our client, he was sentenced to three months in prison, which sentence was suspended, so he couldn't, possibly, have brought a habeas and, that is, your Honor --

Q There is no custody here.

MR. BOWMAN: Excuse me?

Q There is no custody here.

MR. BOWMAN: No, there was no custody and to limit it to habeas, obviously, would, in effect, give the military control over who could bring suit and who could not because, as in this case, they could simply suspend the portion of his sentence, the person wouldn't be in custody and you couldn't bring suit.

Now, the suggestion -- again, I might say that if the Court should reach this, I don't think it should reach it without full briefing because the issue was never raised and hasn't, frankly, been briefed here.

Now, the suggestion to the Court that in deciding -- the Government's suggestion to the Court that in deciding the question of the validity of 134, this Court should not be mislead into thinking that there is a conflict between the values which have led this Court to invalidate vague statutes and the values which are suggested by the Government.

Now, turning to Article 134, I think the significant thing about Article 134 is that it has always been recognized to be broad and indefinite and we have set forth in our brief all the historical evidence regarding the writers, British writers going back to the 1800's and American military writers who have recognized that this

article was indefinite and we have also presented testimony of Congressional hearings in 1912, 1919, 1949 in which it was also recognized that the Article was -- that the language of the Article was indefinite and the Government does not --

Q let me interrupt you once more. I'll try not to do it again.

If your client is out, why is there a case or controversy under the declaratory judgment?

MR. BOWMAN: Because, your Honor, he had a -- he received a Bad Conduct Discharge, your Honor.

Q And is that reviewable by the Court?

MR. BOWMAN: He received a Bad Conduct Discharge taking into effect two convictions because, following this conviction, your Honor, he was convicted, I believe, for theft of a camera, your Honor. So, taking -- the military took both of them into account. It is in the record. Specifically took both into account in giving him the type of discharge which was given to him.

Q And is a declaratory judgment a normal way of reviewing a Bad Conduct Discharge?

MR. BOWMAN: Well --

Q Not without administrative remedies, any way.

MR. BOWMAN: I'll be perfectly honest, your Honor, I really don't know the answer to that.

Q Well, if you win, would that open up every

Bad Dis-Conduct Charge to come in?

MR. BOWMAN: No, I don't think so. If we win --

Q Why not?

MR. BOWMAN: If we win on this, perfectly frankly, I will go back and attempt to get his type of discharge changed --

Q I'm not talking about you. I'm talking about the few other Bad Conduct Dischages. There are a few others.

MR. BOWMAN: Well, I would think that --

Q Were they all other causes of action for a declaratory judgment?

MR. BOWMAN: Well, I am not prepared at this time to talk about the retroactivity of this decision, your Honor. It would only --

Q How about jurisdiction, your jurisdictional question?

MR. BOWMAN: Well -- well, I think --

Q Can anybody who has had a Bad Conduct Discharge walk into a federal district court and ask for a declaratory judgment?

MR. BOWMAN: I think, in terms of jurisdiction, that I believe that the Court would then have to consider the type of situation which was, I think , in the O'Callahan situation as to whether or not -- the factors which were

involved there should be applied to allow --

Q If you deprivedhis Constitutional right, you would say he could?

MR. BOWMAN: Well, our person was being deprived of Constitutional right here, too.

Q I say, if that -- is it your test?

MR. BOWMAN: I think so. Again, I -- frankly, since it has not been briefed, I am really not very familiar with the cases that this Court decided following O'Callan v. Parker as to whether or not who could come in.

I think that if this was the only -- well, I'm really not prepared to discuss that, your Honor, because, frankly, I'm not really familiar with --

Q Well, you might not be prepared, but don't we have to find out whether or not we have jurisdiction?

MR. BOWMAN: Yes, and I think if your Honors decide that the issue is one that merits full consideration, I think the party should be given a chance to brief it because it hasn't been --

Q The question is always open.

MR. BOWMAN: Your Honor, I realize the issue and I am only urging that --

Q And the two of you can't give us jurisdiction by agreement.

MR. BOWMAN: I fully agree with that but if this

Court decides that the question of jurisdiction is really an important one in all collateral attack, I really think that it should be briefed fully and shouldn't be done just on this record and, frankly, on cases that I am not absolutely and completely familiar with and if it hasn't been raised below, ever.

Q Right.

MR. BOWMAN: Now, the Government really doesn't seriously challenge the historical evidence and really makes no effort to defend the language itself. And Grayned v. City of Rockford tells us that statutes such as this are vague and should be judged on their face. They are vague because they offend several important values.

One, lack of fair warning.

Two, lack of guidance to the enforcing authorities leaving them with uncontrolled discretion.

And, thirdly, where statutes affect the First Amendment rights, it must be narrowly drawn to save it from the vice of overbreadth.

And a statute which violates any one of these values should be struck down.

Now, the Government's principal argument regarding approach, I think, is that the Court shouldn't reach the statute on its face and the Government's position apparently is that if Avrech was aware that his conduct was

prohibited by Article 134, that ends the question of vagueness. Although we don't concede that Avrech, in effect, had fair warning.

The fallacy of the Government's argument is that it completely ignores the second value which is a lack of standards to guide the enforcing authorities.

This Court has consistently held that you cannot leave it to the enforcing authorities to determine what conduct falls within a statute.

Q I think, Mr. Bowman, that as I understood the Solicitor General, and I am quite certain that I did, he freely acknowledged and conceded that if this were a section of a criminal code, federal or state, that it would be unconstitutionally vague. And in that way he rather finessed a part of your argument, I think.

MR. BOWMAN: Well, I realize that. I didn't -- the way I understood it, I didn't understand that he had conceded that you would approach it on its face and that was --

Q I thought I heard him say that.

MR. BOWMAN: If, indeed, that was it, I gladly accept the concession that the Court should have reached this statute on its face.

The Government argues, then, that if the Court reaches the statute on its face, that the statute is not

invalid and it sets forth several reasons within its brief and here on oral argument as to why the statute is not invalid.

They argue in the brief, at least, that there is a custom and practice in the military as to what offenses are covered.

Now, I acknowledge, of course, that in Dynes v. Hoover, this Court, although recognizing the apparent indeterminateness of the Article, held that there was a custom and practice in the military as to what offenses are covered.

Well, I suggest to you that what this Court did -- that the times have changed since Dynes v. Hoover. Dynes v. Hoover was only concerned or involved itself with a situation where there was a small professional army.

Now, however, the armies have obviously changed and were, up to the time of this conviction, two to three million men and you cannot say that practical men in the Navy or Army know what is covered by this Article.

Secondly, the history of the Article has certainly changed since a hundred years ago. The Article, we have shown in our brief, really covers a growing number of offenses.

Q Do you suggest that he was not aware that this might be a court-martial offense?

MR. BOWMAN: Yes, your HOnor, I will make that point that he was not, in fact, aware.

Q Well, how do you square that with the precautions he took and the things that he said?

MR. BOWMAN: Well, the only thing that he said, your Honor, is that, "Are your opinions worth risking a court-martial?" and that, we urge, is really different from knowing that whether or not your conduct is covered by this statute. All he said -- I mean, I think --

Q Does he have to focus on which particular statute?

MR. BOWMAN: No, but he has to --

Q Some statute?

MR. BOWMAN: Well, I think he has to know something more than that his views are going to be displeasing to the military and even if he did have fair warning, of which, again, as I say, that doesn't meet the question of the vagueness of the statute because he is still left with the second vice, namely, the failure to provide guidance for enforcing authorities.

Moreover, the Government, if you are looking at the term "disloyalty" in the Manual, the Government in its brief freely concedes that the term "disloyalty" in the Manual is vague and it is indefinite and you cannot tell in advance, the Government states in its brief, as to what type

of conduct falls within the Manual's definition of disloyalty.

Now, the Government doesn't say in its brief what this custom and practice is or where it may be found. And it suggests that, perhaps, it can be found in the Manual but it also admits that the Manual is only an illustrative guide and the Court of Military Appeals has frequently held that the listing of an offense in the Manual doesn't mean it it covered by Article 134 and it is also held that the failure to list an offense in the Manual doesn't mean that it is not covered.

So the Manual can't possibly tell you what is custom and practice. Indeed, Mr. Justice Clark below said that the Manual is only a mini-digest of the roving character of Article 134.

Now, the Government suggests --

Q Now, let's assume that the Court of Military Appeals had upheld a conviction for conduct A and said that that conduct is within 134 and let's assume that it has done so 100 times.

Now, why would that section, that Article be vague as to someone who now is about to engage in the same conduct?

MR. BOWMAN: Well, first I would argue, of course, that fair warning -- this Court has always held that fair warning must be given by the language of the statute itself

and not --

Q It is fairly rare to be held otherwise in the validity of a the upholding of/a statute that talked in terms of the detestable and abominable crime against nature and held that a judicial construction of it gave fair warning.

MR. BOWMAN: Yes, that is true and --

Q We certainly took that approach last year in Letter Carriers.

MR. BOWMAN: Well, I would --

Q It wasn't a criminal statute.

MR. BOWMAN: No, it wasn't a criminal statute. It was a regulatory statute and I would concede, I think -- as I say, after the argument that fair warning --

Q But there are cases that say once a statute has been construed, it is just as though the statute now read that way.

MR. BOWMAN: I would say that if there was a specific -- if the Court of Military Appeals had specifically said that the type of conduct he has engaged in is covered by Article 134, then I would have to concede that, yes, indeed, he did --

Q And if that is so, you would also be conceding that the enforcing authorities wouldn't have any roving authority about that conduct.

MR. BOWMAN: About that particular conduct, but

that is not the case.

Q All right, that may be, but nevertheless, to that extent, the statute in this case should not be declared invalid on its face. If the statute has ever been construed in the manner that we have been talking, the statute should not be declared invalid on its face here.

MR. BOWMAN: If that is the case, but that is not the case here, your Honor. I concede that if the Court of Military Appeals had said that this particular conduct in this particular circumstance is covered by the statute, that is true, but that is not true here.

Q You must be saying, then, that the Court of Military Appeals has never construed Article 134 definitely to include certain conduct?

MR. BOWMAN: That is quite correct. It has not. Indeed, as I say, it has stated that the failure to list an offense doesn't mean that it can't be covered by Article 134.

Q I understand that.

MR. BOWMAN: Yes, well, the Court -- right, but the Court --

Q But how about the ones where it has got firm convictions?

MR. BOWMAN: It has a firm conviction, but it has never said what --

Q Regarding engaging in certain conduct?

MR. BOWMAN: Yes, but it has never said that Article 134 has been limited to that conduct.

Q I know it, not limited, but at least for the next fellow who does that, engages in that conduct --

MR. BOWMAN: Yes, in that particular conduct --

Q You are talking a variety of overbreadth, is what you are --

MR. BOWMAN: Yes.

Q -- because the statute still could be vague as to somebody else, could it not?

MR. BOWMAN: Yes.

Q For that particular conduct.

MR. BOWMAN: That -- if the Court of Military Appeals had specifically said -- yes, your Honor, I --

Q Well, if it defends a conviction for certain kinds of conduct, it seems to me it has said that 134 covers it.

MR. BOWMAN: Yes, your Honor, but it hasn't done that with respect to the particular conduct that we are involved in here.

Now, the Government suggests that, apart from what the Manual represents as a repository of custom and practice, that the Manual gives fair warning.

Now, the inadequacy of this is, as I have shown with regard to custom and practice, is that the Court

of Military Appeals has frequently held that offenses which are not covered can still be charged under 134.

In addition, new offenses are added every single time you have new editions of the Manual. As a matter of fact, the disloyalty provision here was added in 1951 after the Uniform Code of Military Justice was enacted and you cannot say here that there was any considered or legislative judgment that this particular type of conduct should be covereed.

Now, the Government's principal argument, I think, really goes to the question of/the constitutional rules of vagueness which we have been discussing have any application to the military and the Government must offer some justification why the rules for the military should be different and it is not enough to say just that the military is involved.

This Court has always taken the approach that the party who wishes to relax Constitutional principle must have the burden of showing why those principles should not apply in the particular situation and this Court indicated in Frontiero and Toth v. Quarles that this rule certainly applies to the military.

And the highest military courts in Jacoby and Tempia and the lower federal courts have taken that approach, as well as the two circuit courts here and there are compelling reasons, I think, why the Sonstitutional standards

of vagueness should apply to the military.

In the first case, you have people in the military who are draftees, volunteers who leave their civilian life for at least a period of two years. They give up civilian life, they make sacrifices and there is absolutely no reason why, with regard to knowledge, why they should not have the same protection with regard to statutes that civilians have.

Furthermore, the uniform Code of Military Justice is a penal statute. It is a penal statute and it is no different from any other civilian penal statutes. It imposes penalties, people can go to jail for this and there is no reason why different standards should apply and the Government offers nothing here, really, than code words and slogans such as "military necessity" and instead of any analysis of the issue.

Now, I admit that it may be convenient for the military to have a vague and overbroad statute. Indeed, all enforcing authorities, I am sure have come which find it convenient to have such a broad statute, to have an open-ended statute. But that is precisely why this Court has struck down such statutes because you can't give enforcing authorities wide and uncontrolled discretion.

Now, there are, indeed, with regard to Solicitor General's argument that the military needs Article 134, I

suggest to you that there are at least several military men who don't agree with that, who say that we can get by without Article 134. The chief judge, the Army Board of Review, General Hudson, said that and the Secretary of Defense own task force on the administration of justice recommended that Article -- which included, by the way, the judge advocate generals -- recommended that Article 134 be abolished and I suggest for any conduct that the military doesn't like, they have a very simple solution and that is to go to Congress and enact specific punitive articles. They have done this before and/when the Uniform Code of Military Justice was adopted in 1949, there was certain conduct covered by Article 134 which were made into specific punitive articles.

Q Could you suggest by way of hypothesis what specific provisions -- you have apparently thought about it -- what specific provision would you suggest would meet this problem?

MR. BOWMAN: Well, I presume you would run -- I think you could draw a statute -- I, frankly, haven't thought of the wording -- which would prohibit all -- which prohibits the, let's say, the publication of any statement which, let's say, draws into question Governmental policy. I think you would then, of course, run into the First Amendment.

Q Do you think that is less vague than this?

MR. BOWMAN: Frankly, to be perfectly honest, your Honor, I have not thought about this statute sufficiently to draw it up just without thinking about it.

Q But you are telling us this could readily be done. I thought that is what you were saying.

MR. BOWMAN: No, I am saying that if there is --

Q It is very easy to tell.

MR. BOWMAN: No, I am saying that if there is particular conduct which the Army doesn't like, they should go and enact specific articles. I am not prepared at this time to draft a statute right now as to what could be covered. I think that you could draft a statute. You might, of course, in this particular context, run into a First Amendment question as to whether they could validly pass a statute, or whether a statute like that would withstand this Court's scrutiny but, frankly, your Honor, I am not prepared to, at this time, draft a statute which might cover this activity.

Q But the Solicitor General thinks that the fact that you are in the Army gives you a little more knowledge than you have in civilian life.

MR. BOWMAN: Well, your Honor, now, I take issue with that. I don't think --

Q Well, do you agree that after you have been in the Army about 30 days, you realize that you, for various

reasons, you find out you don't have the same freedom of speech you have at home?

MR. BOWMAN: I think that is true and I think --

Q Is that true?

MR. BOWMAN: It is certainly true, your Honor, but it is certainly no indication, if you look at the statute, at the Manual, as to what you can and cannot do. Obviously, when you --

Q But you do know that it is a little less.

MR. BOWMAN: Yes, I agree that --

Q However, it's the Solicitor's point that in that framework, the longer you were in there, you began to understand.

MR. BOWMAN: I think you begin to understand that anything you do which the commanding officer might not like, you do risk punishment under Article 134. I admit that the freedom of speech is less. That does not mean, and I won't go into it now, but that doesn't mean that the test --

Q I am not limited as to 134. There are a lot of other ways you can learn, other than 134.

MR. BOWMAN: Well, that is true, but Article 134 does stand and this is --

Q Did you ever hear about K.P.?

[Laughter.]

MR. BOWMAN: Oh, I've heard about K.P., your

Honor but if, as Mr. Justice Stewart, I believe, suggested to the Solicitor General, if the military could easily have given an order -- or your Honor did -- an order not to do what he did. It was very simple.

Now, in the few moments --

Q Do you think that is really an enforceable mechanism, to wait until something is happening and then give a direct order not to do it?

MR. BOWMAN: Well, I think it would simply have taken care of this problem and it would probably take care of a lot of problems in the military, yes.

Q Do you think as a generality that would be an effective mechanism?

MR. BOWMAN: No, I don't think so. I think that as a practical matter, the way to cover this type of conduct is to enact specific punitive articles.

Now, in the few moments remaining, I would just like to discuss the question of overbreadth. Article 134, the Government concedes, at least in its brief, reaches First Amendment activities and the Court has struck down statutes and the Government concedes that the Court has struck down statutes on their face if it reaches First Amendment activities.

The Government's point here is that since Article 134 covers conduct outside of the First Amendment

as well as within the First Amendment, this Court should not consider the statute on its face.

Now, the Government cites no case for that proposition and, frankly, I note no case holdings that because a statute can cover all types of conduct, it should be held overbroad because it impinges on the First Amendment. This statute, because it is so all-embracing, covers a whole variety of activity including First Amendment activities and is, therefore, overbroad and should be struck down.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:55 o'clock p.m., the case was submitted.]