THE MILITARY COMMANDER'S AUTHORITY TO REGULATE THE CONDUCT OF MILITARY PERSONNEL OFF-POST

A Thesis

Presented to

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other Governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the Zone of Interior military commander's authority to regulate the off-post conduct of military personnel (conduct which is otherwise lawful).

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CHAPTER I

INTRODUCTION

It has often been said that the military is overrestrictive, paternal in nature, and unfair in what it permits its members to do. Perhaps to those individuals who have been unable to adjust to the military way, a criticism of the system would appear justified. To some of those in command a similar criticism would appear justified on the basis that command is lacking and that we should return to the "good old days" when the commander was king and could tyrannically impose his wishes upon those subordinate to him. The purpose of this study is to review some of those areas or activities involving off-post conduct wherein commanders have, successfully or otherwise, sought to impose limitations and restrictions. Moreover, the criteria of what may legally be done by commanders and the rationale used to determine that legality will be considered. This study is intended to be useful not only in the prosecution and enforcement of regulations involving off-post conduct but to

serve as an aid or guideline in determining those limitations which may be legally imposed upon proper promulgation.

To promulgate that which is illegal can be as detrimental to a commander as the lack of adequate command. History will probably show that few, if any, countries have allowed their military personnel freedoms of the magnitude enjoyed by the American serviceman. Perhaps the following is appropriate to the American military as well as the civilian community:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without authority."[1]

The military lawyer in assisting his commander should advise the latter to exercise only that control which is legal and necessary to accomplish the mission and to do so with well meaning and understanding. This study is further intended to that end.

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[1] J. Louis Brandeis, Olmstead v. United States, 277 U. S. 438, 479 (1927)

CHAPTER II

SOURCE OF AUTHORITY AND HISTORICAL BACKGROUND

Since man has been living in any type of communal life it has been necessary for a certain amount of rules and authority to be observed. In the early military codes the necessity of obedience was expressed with specific provisions of penalties to be placed upon those who disobeyed.[2] It is quite obvious that discipline, based upon obedience of orders, is a necessary element to the successful operation of the military. The current provisions of military law requiring obedience to lawful orders and regulations are found at Articles 90, 91, and 92 of the Uniform Code of Military Justice (10 USC 801-936). Paragraph 171, Manual for Courts Martial, United States, 1969, provides that a general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the

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[2]W. Winthrop, Military Laws and Presedents 572-577 (2d ed. rev and enl. 1920)

official issuing it. The subsequent cases reported in this study will show that the above test is applicable to all orders. Just as in the civilian community where acts of the legislature are presumed to be proper, "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[3] This study will consider controls placed upon the private off-post conduct of the member and its relation to military duty. Training directives, and other obvious "military duty" type orders are not considered herein.

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[3]Par 170b, Manual for Courts-Martial, United States, 1969

CHAPTER III

SPECIFIC AREAS OF CONTROL

While the commander can certainly promulgate and enforce lawful orders and regulations, we should consider the limitations of such authority. All activities which are reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom responsibility of the command rests.

a. LIMITATIONS ON SPEECH AND OTHER SIMILAR ACTIVITIES

Freedom of speech has long been a fundamental right of the American citizen guarded by the courts. The general limitations has been the "clear and present danger" test.[4] The individual citizen has been well protected when he has sought to express his opinions in the political arena. While the military citizen

[4] Schenck v. United States, 249 US 47 (1919)

on active duty retains his political rights to vote and express his opinions privately and informally on all subjects and candidates, he is not permitted to engage in any public activity which might reasonably be interpreted as influencing an election or the solicitation of votes for himself or others.[5] Although not necessarily in violation of that statute, prior to February 1969, the Army had taken the view that the display of a political bumper sticker on an automobile by a member of the Army would violate the spirit and intent of the Army regulation implementing the above cited statute.[6] Moreover, such a public display of political allegiance or indorsement among members of the Army serve the cause of divisiveness rather than team work, mutual trust and respect.[7]

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[5] 50 U.S.C. 1475

[6] JAGA 1968/4349, 9 August 1968

[7] JAGA 1968/4881, 16 December 1968

This becomes apparent when one considers such emotional slogans as "Support Your Police", "Impeach Earl Warren", "Black Power", Your Home Is Your Castle", "Register Communists, Not Firearms", "Make Love Not War", and such disrespectful slogans as "Dump The Hump", "Tricky Dick" or "Would You Buy A Used Car From This Man?"[8] While initially the ban against political stickers may appear oppressive, it is arguable that many serious disruptive incidents could result were such displays of stickers allowed within the Army.

A soldier displaying a "Black Power" sticker on his automobile could become involved in an argument or fight with another soldier displaying a Confederate "Stars and Bars" emblem. However, it is also arguable that the display of such stickers would not cause any more disruptive incidents than discussions, which could become heated, in the barracks, day rooms, clubs or other places frequented by military members.

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[8] JAGA 1968/4881, 16 December 1968

Similarly, "Make Love Not War" could be viewed as support for hippies and draft card burning, but would probably not start any more fights than arguments or discussions between soldiers who supported such movements and soldiers who felt strongly in favor of the war in Viet Nam. However, it is apparent that an officer or noncommissioned officer could encounter difficulties in maintaining discipline and inspiring vigorous training with his subordinates.

Another factor to consider is that the regulation did not appear to have any limits in its application. A soldier at home on leave could not drive his parents' automobile if it had a political bumper sticker displayed. This would appear to be so even if there were no military bases within a five hundred mile radius.

Assuming that Army regulations had permitted military members to drive automobiles with political bumper stickers, could an officer have displayed a "Tricky Dick" sticker during the 1968 campaign until Inauguration Day in January 1969? After that date, if

he had not removed the sticker would he have been subject to punishment for violating Article 88 of the Uniform Code of Military Justice? With the same assumption, except in the case of an enlisted man, would he have been subject to punishment for violating Article 134, Uniform Code of Military Justice?

In February 1969, the Secretary of the Army reviewed the political bumper sticker policy and concluded that individual members of the Army should be free to display bumper stickers indicating support for particular candidates so long as they comply with long standing policies prohibiting active participation in partisan political activities.[9] The intent is to maintain the Army as an apolitical institution, the members of which retain their franchises but forego overt partisan political activity.[10]

While the restrictions and problems of enforcement have been solved by the removal of the ban against

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[9] JAGA 1969/3650, 17 March 1969

[10] JAGA 1969/3551, 5 March 1969

political bumper stickers, the questions concerning what happens when the subject of a derogatory sticker becomes the Commander in Chief still remain.

The United States Court of Military Appeals, in United States v. Voorhees,[11] considered the necessity of cohesiveness, trust, and mutual respect. In that case, the accused officer had written several publications concerning the Korean conflict. He was later charged with violation of an Army regulation,[12] which provided that "personnel on active duty will submit their writings and public statements to the appropriate Security Review Authority", prior to publication. That regulation was premised on Secretary of Defense Johnson's Memo of June 7, 1949, and buttressed by a subsequent memo of President Truman of December 5, 1950, whose purposes were not to curtail the flow of information to the American people but rather to insure that the information made public was accurate and fully in accord with the policies of the United States Government.

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[11] 4 USCMA 509, 16 CMR 83 (1954)

[12] Army Regulations 360-5, 20 October 1950

The Voorhees' publication concerned General Douglas McArthur as Commander-in-Chief of the United Nations Far Eastern Forces fighting in Korea. At issue were questions of security, propriety and policy. The Court did not decide whether clearance requirements for "propriety" and "conformance to policy" as distinct factors would be constitutional. The Court held that the right to free speech is not an indiscriminate right; it is qualified by the requirements of reasonableness in relation to time, place and circumstances. Accordingly, restraints which reasonably protect the national interest do not violate the constitutional right of free speech. Judge Latimer (concurring in part and dissenting in part) perhaps expressed the view that was of greater moment to the military. He stated:

> "Undoubtedly we should not deny to servicemen any right that can be given reasonably. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the conflicting interest between the right of

> the serviceman to express his views on any subject at any time and the right of the government to prepare for and pursue a war to a successful conclusion. Embraced in success is sacrifice of life and personal liberties; secrecy of plans and movement of personnel; security; discipline and morale; and the faith of the public in the officers and men and the cause they represent.[13]

Judge Latimer paraphrased the rule enunciated by the Supreme Court in a number of opinions. That rule is that while freedom to think is absolute of its own nature, the right to express thoughts orally or in writing, at any time or place, is not. Judge Latimer in summary stated:

> "I conclude that the armed services have the power to limit the rights of free speech of their personnel, but the power must be considered in two ways: First, for the power to regulate the flow of information and, second, for the authority to suppress or prohibit its publication. They, in one sense, blend as there is no absolute free speech or free press if permission must be obtained from an official in the service before publication."[14]

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[13] 4 USCMA 509, 16 CMR 83, 105 (1954)

[14] 4 USCMA 509, 16 CMR 83, 109 (1954)

The information that authorities sought to suppress contained some disparaging remarks which could have caused loss of respect for certain officers and other high officials. While one may argue that disclosure of information which might be injurious to a military commander may be punishable, or perhaps compensable under civil suit, such might not be adequate within the military. In the military sphere, punishment for violation of law is not always an adequate protection against an abuse of a Constitutional privilege; prevention rather than punishment becomes imperative. Prevention is necessary to protect and preserve the military establishment. It might be stated that in regards to his command, the commander can limit the number of fronts which he must defend against.

In United States v. Wysong,[15] the accused had attempted to impede the progress of an official investigation involving his wife, stepdaughter, and

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[15] 9 USCMA 249, 26 CMR 29 (1958)

members of his company, by interrogating and threatening persons called to appear as witnesses. The accused's company commander ordered him "not to talk or speak with any of the men in the company concerned with this investigation except in line of duty." The Court of Military Appeals said that the order must be set aside because it was so broad in nature and all inclusive in scope as to be illegal. The order severly restricted the accused's freedom of speech in that it not only restrained him from communicating with certain persons on duty but off duty as well. In addition, the order was framed in such a manner that it could be interpreted to prohibit the simple exchange of pleasantries. Another defect in the order was that of vagueness and indefiniteness in failing to specify the particular persons concerned with the investigation.

In a similar case, United States v. Aycock,[16] the accused was ordered not to contact witnesses

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[16] 15 USCMA 158, 35 CMR 130 (1964)

concerned with charges against him. The Court of Military Appeals bluntly stated that while the military authorities are authorized to issue orders, they may not perversely use this authority to hamper an accused in military justice proceedings.

Immediately following United States v. Aycock, the Court was confronted with United States v. Enloe.[17] A regulation had been promulgated which prohibited private pretrial investigation by defense counsel of agents of the OSI presumably because of the tendency of defense attornies to misrepresent agents' pretrial statements during trial proceedings. The Court stated that such prohibitions were invalid and inconsistent with the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951, and unwarranted restriction on the rights of defense counsel to meet the charges against the accused.

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[17] 15 USCMA 256, 35 CMR 228 (1965)

In United States v. Howe,[18] the Court of Military Appeals considered the conduct of Second Lieutenant Henry H. Howe, Jr. The accused had participated in an anti war demonstration off-post by carrying and displaying to the public a sign reading "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACIST [sic] IN 1968" and on the other side the words "END JOHNSON'S FACIST [sic] AGGRESSION IN VIETNAM." The court on review found this to be an offense under Article 88, UCMJ, and discussed the historical aspects of that Article.[19] In reviewing the accused's actions under Article 133, UCMJ, the court stated that the right to free expression was not curtailed. The Court further discussed the right of speech to the serviceman protected by Army Regulation 600-20, 31 January 1967 and its predecessor. The Court fully recognized that the right to free speech and expression was more limited in the military community that in the civilian community.

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[18] 17 USCMA 165, 37 CMR 429 (1967)

[19] For an informative article on the Howe case see Kester, Soldiers Who Insult The President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697 (1968)

The offense in Howe was not participation in a political demonstration, but the use of contemptuous language against the Commander-in-Chief. The right to support a particular political view or candidate does not include the right of a military member to express contempt of the Commander-in-Chief. A military officer may not agree with all of the military programs of the government, but he is in the status of an officer voluntarily and therefor must obey orders and use discretion in his criticism of national policy. He should be allowed to discuss his personal opinions on policy, but he should not attempt to undermine national policy.

The recent increase of dissent within the ranks to the war in Vietnam is of great concern to the military establishment. Discussions and demonstrations are being held in increasing numbers in "coffee houses" located in cities near military posts. Underground newspapers, handbills and miscellaneous publications are appearing near and on military posts. These publications are emotionally slanted against national policy and the war in Vietnam.

The ability to publish a newspaper, off-post, that is directed at military personnel is of limited value unless the newspaper can be placed in the hands of a large number of soldiers. Obviously the best means of doing this is to distribute the publication on post. Prior to April 1969 the installation commander had general authority to control unauthorized distribution of handbills, and was required to use only reasonable policies in denying requests for on-post distribution privileges. The Judge Advocate General of the Army in providing guidance expressed the opinion that if commanders deny approval to distribute publications on post through other than regularly established distribution outlets, they should be prepared to justify their actions by citing reasonable standards for denying approval. Further, vague criteria such as "good taste" and "in the best interests of the command" are of doubtful validity and likely to invite legal challenge. In acting on a request to distribute a publication on post, the installation commander will be guided by the principle that, except in cases in which the publication constitutes a clear danger to military loyalty, discipline,

or morale, military personnel are entitled to the same free access to publications as are other citizens.[20]

The above opinion considered Shuttlesworth v. City of Birmingham[21] wherein the U. S. Supreme Court reviewed a conviction for violating an ordinance of Birmingham, Alabama, which made it an offense to participate in any parade, procession or other public demonstration, other than a funeral, without first obtaining a permit from the City Commission. The Court held that the ordinance confered virtually unbridled and absolute power to prohibit any parade, procession or demonstration, except a funeral. Such prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional.

In Tinker v. Des Moines Independent Community School District,[22] the U. S. Supreme Court considered

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[20] JAGA 1969/3715, 2 April 1969

[21] 37 U.S.L.W. 4203 (1969)

[22] 37 U.S.L.W. 4121 (1969)

whether students could wear black armbands to school to publicize their objections to the hostilities in Vietnam. The school officials prohibited the wearing of black armbands in order to prevent disturbance of school discipline. The Court stated that First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. Moreover, it can hardly be argued that either students or teachers shed their constitutional right to freedom of speech or expression at the school house gate.

It can hardly be argued that the individual citizen sheds his constitutional rights to freedom of speech at the reception station gate when he acquires a military status. However, on the basis of military necessity, the essential requirement of discipline, loyalty and morale, certain limitations must be placed on freedom of speech. As in the civilian community there is no absolute right to free speech.[23] The

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[23] For an excellent comparison of the rights of the individual soldier with the rights of the private citizen in the area of constitutionally protected speech, see Brown, Must the Soldier Be a Silent Member of Our Society? 43 Mil. L. Rev 71 (1969)

military commander must be on firm ground in placing limitations on free speech. Prior restraint must be exercised with extreme caution. Perhaps the better view is to permit a broad latitude of free speech. When a clear danger to discipline, morale or welfare of the service is obvious, administrative action to discharge the wrongdoer with a characterization of his service as "unfit" or "unsuitable" would be appropriate. Discipline, morale, loyalty and the welfare of personnel are essentials of the military because of its unique character. And because of this unique character there is justification for limiting free speech. The requirement should be that the limitation must have narrow, objective and definite standards and must be restrictive only to the extent that the interests of the military service are preserved. Again, the balancing of the interests of the service and of the individual must be controlling.

An Army Regulation[24] implementing 10 U. S. C. 1034 provides that an individual cannot be prevented from communicating with any member of Congress unless it is for an unlawful purpose or violates national security. Moreover, individuals may write or speak on subjects not involving military matters or foreign policy without submitting their writings or speeches for review and clearance. They also may write "letters to the editor," which constitute statements of personal opinion and knowledge, without submitting them for review and clearance even though the subject matter of such letters may involve military matters or foreign policy.[25] The individual, however, is still responsible for any unauthorized disclosure of secure or privileged information which he might disclose. It is apparent that the military member enjoys a high degree of freedom of speech. Military necessity need only take precedence over individual free speech when such speech is aimed at destruction of discipline, morale and loyalty.

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[24] Par 41, Army Reg 600-20, 31 Jan 1967, as changed

[25] Par 9, Army Reg 360-5, 27 Sep 1967

b. SAFETY WHILE OPERATING MOTOR VEHICLES OR MOTORCYCLES OFF-POST

It is obvious that a command must be healthy, composed of ablebodied men, and ready to move out within a reasonable period after notice. Army regulations specifically provide that the commander is responsible for the safety of his command.[26] An injury incurred off-post, whether the member is in a duty or leave status, can be just as disabling as one incurred on post and present for duty. Accordingly, a commander should be permitted to place certain requirements on the members of his command which may be over and above those which the surrounding state officials may impose.

Although the "safeguards" against so called oppression in the civilian legal forum may be stronger than those of the military, a review of "police power" within the civilian community should be considered by the military lawyer when he assists his commander in preparing additional legal restrictions on what would otherwise be legal off-post conduct.

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[26]Army Regulation 385-10 (8 April 1963)

Of recent interest has been the requirement by some states that operators and passengers of motorcycles and similar vehicles wear safety helmets. The statutes involved have usually been contested on the grounds of improper exercise of police power and an improper delegation to the registrar of motor vehicles to prescribe and approve the type of helmet to be worn.

In State ex rel Colvin v. Lombardi,[27] the Supreme Court of Rhode Island[28] held that the state statute authorizing the registrar of motor vehicles to prescribe the type of helmet to be worn by motorcycle operators bears a reasonable relationship to highway safety generally and does not constitute an improper exercise of police power in attempting to protect people from consequences of their own carelessness. In a recent New York case,[29] the Genesee County Court considered a similar statute[30] which made it unlawful for any person to operate or ride upon a motorcycle

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[27] 241 A.2d 625 (1968)

[28] General Laws of Rhode Island, sec 31-10.1-4 (1967)

[29] People v. Carmichael, 288 N.Y.S. 2d 931 (1968)

[30] Subdivision 6, sec 381, Vehicle and Traffic Law (1967)

unless he wore a protective helmet of a type approved by the commissioner. The requirements were that the helmet must be equipped with either a neck or chin strap and be reflecterized on both sides. Moreover the commissioner was authorized and empowered to adopt and amend regulations covering the types of helmets and the specifications therefor and to establish and maintain a list of approved helmets which met the specifications. The court discussed whether the statute was sufficiently clear and definite, amounted to an improper delegation of legislative powers, encompassed a valid exercise of police power by the State, was discriminatory so as to deny the defendant equal protection of laws, was an unreasonable burden on interstate commerce and constituted an infringement on the defendants' right to privacy. In its discussion, the reasoning of the court was not unlike that of the military. To warrant intervention by the Courts, the challenged legislation (regulation) must be manifestly, undoubtedly, clearly, substantially and palpably inconsistent with constitutional standards. The

rationale for the caveat is the underlying principle that the legislature is presumed to have acted within the limits of its authority. The court assumed the role quite similar to the military when it stated in effect that it is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. The inherent danger of operating a motorcycle, not only to the driver but to other users of the highway, was considered in upholding the validity of that statute as a valid objective of the state's police power. A similar position was taken by the Supreme Judicial Court of Massachusetts.[31] The Court of Appeals of Michigan, Division 2,[32] had a different view which would also appear to be diametrically opposed to the military; and one which the author feels is perhaps unrealistic. That court held that

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[31] Commonwealth v. Howie, 238 N.E. 2d 373 (1968)

[32] American Motorcycle Association v. Davids, 158 N.W. 2d 72 (1968)

the restricting statute had a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare. This was in effect stating that the state had no interest in what an individual did to himself.

It would appear that the state should have an interest in the welfare of each individual as the collection of individuals compose the public. In the military the argument can certainly be made that each individual owes a duty to his fellow members to maintain his own health and safety, as the military machine can only function properly when it is composed of all of its required parts. Each member of the team has a specific job which has been carefully planned and programed.

The importance of safety in the operation of vehicles can not be over emphasized. The carnage on the public highways each year is very high. It is arguable that the military commander does not have a more qualified staff than most of the states to prescribe safety measures. However, a definite military interest is present in conducting safety programs. It is the

author's opinion that the commander should prescribe all reasonable safety measures to be followed by his command. However, first it should be shown that a certain factor has caused injuries or accidents and that the proposed measure will serve to decrease injuries or accidents.

c. LIMITATIONS AS TO WHERE MAY LIVE, VISIT AND TRAVEL

Of great concern, and necessarily so, is the morale of the soldiers within any given command. A cohesive fighting unit must have a common purpose. It must be molded not only as a method of waging war and surviving but must have an objective to defend or protect from those forces which seek to overthrow the United States. A means of achieving this is to have equal opportunity within the Armed Services. Every military commander has the responsibility to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control but also in nearby communities where they may live or gather/during off-duty hours. The Armed Forces member is

somewhat unique. He lacks the freedom of choice in where to live, to work, to travel and to spend his off-duty hours. Racial discrimination adversely affects the military member's morale. The policy of the Department of Defense is that the members of DOD should oppose discriminatory practices on every occasion, while fostering equal opportunity for servicemen and their families, on and off base.[33] The stated policy of the Department of the Army in this regards is that "Equal and just treatment of all personnel exerts direct and favorable influence on morale, discipline, and command authority. Since these are key factors contributing to combat efficiency, such treatment is related to the primary mission of command."[34] The Department of Defense has undertaken to use the off-limits sanction in those instances where civilian housing areas adjacent to military installations refuse to rent free of discrimination.[35]

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[33] Department of Defense Directive 5120.36 (26 July 1963)

[34] Army Regulation 600-21, para 3b(1) (18 May 1965)

[35] Department of Defense Directive 1338.12 (8 August 1968)

A study of the housing problems faced by Negro families assigned to Fort Holabird, Maryland showed that 71 percent of the military families residing off-post in apartments or trailers were within 30 minutes commuting distance of Fort Holabird. Eighty-five percent of the white military families rented housing facilities within that area. By contrast, only 27 percent of the Negro military families had been able to rent within that same area. Only 24 percent of the housing units in that area were available to military families regardless of race. Clearly, the primary reason that Negro families experienced difficulty in obtaining suitable housing within a reasonable commuting distance of Fort Holabird was racial discrimination.

The Secretary of the Army directed that certain corrective actions be taken. After 1 August 1967 military personnel moving into the Fort Holabird area or changing their place of residence would not be authorized to enter into new leases or rentals of an apartment or trailer court facility in the area within approximately three and one half miles of the center

of Fort Holabird unless the facility was available without regard to race, creed or color to all military personnel. The Post Commander was directed to immediately advise the owner of each rental facility within the above designated area that, after 1 August 1967, military personnel would be authorized to rent units in the owner's facility only after written assurance that the facility observed a policy of equal opportunity for all military personnel. This information was also given to all Army personnel when they received orders assigning them to the Baltimore area.[36]

While such action will probably improve the living conditions and morale of military personnel, the Department of Defense has included certain limitations on such policies. The military commander has been charged with the responsibility to oppose discriminatory practices affecting his men and their

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[36] Memorandum For The Chief of Staff, From The Secretary of the Army, Subject: Unsatisfactory Housing for Negro Military Families Living Off Post in the Fort Holabird Area, dated 21 July 1967

dependents, yet he is permitted to use the off-limits sanction only after approval by the Secretary of his military department.[37] True, the off-limits sanction can have a tremendous effect on the economic conditions of the landlord, but since the commander has certain responsibilities he should not be hampered in doing them. This is but another area where the commander should be permitted to act on his own and if he is a good commander, no harmful results will come of his actions.

Other purposes for which the off-limits sanction may be imposed are for health and general welfare. There has been established the Armed Forces Disciplinary Control Board.[38] The purpose of the board is to eliminate conditions inimical to the health, morals, and welfare of Armed Forces personnel, and for insuring the establishment and maintenance of the highest degree

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[37] Department of Defense Directive 5120.36, Par II C (26 July 1963)

[38] Army Regulation 15-3 (12 March 1965)

of liaison and coordination between military commanders and civil authorities. Joint service agreements of the Armed Forces Disciplinary Control Board will not prevent any commander from taking individual action as he may deem proper in furtherance of the purpose of the regulation; however, he should report his action to the appropriate board as soon as possible.[39]

When as area or establishment is placed off-limits, there is a good possibility that more than the servicemen will complain. The proprietor of the off-limits establishment of course will feel an economic pain by virtue of his loss of revenue from the military personnel. A case of interest is Ainsworth v. Barn Ballroom Company.[40] In that case the Army and Navy Disciplinary Control Board recommended that a certain dance hall be placed off-limits. Military Police were placed in front of the building to keep servicemen out. The proprietor of the establishment attempted to prove that civilians

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[39] Army Regulation 15-3, para 9j(12 March 1965)

[40] 157 F.2d 97 (1946)

refused to enter the dance hall because of the Military Police. The civil court held that this did not show a taking of property of the dance hall owner nor a trespass ~~not~~ nor an unwarranted interference that would give rise to an action for damages against the military officers issuing the off-limits order. The court said that it was without authority to determine whether the military authorities issuing such orders had abused discretion. In a later case, Harper v. Jones,[41] the business establishment of a used car dealer at Lawton, Oklahoma, who did substantial business with military personnel stationed at Fort Sill, became the object of the off-limits sanction. It seems the dealer sold an automobile, purportedly new, to a lieutenant on a conditional sales contract. The lieutenant made a down payment of cash and his old automobile. Two weeks after the transaction the lieutenant discovered that he had not purchased a new automobile as had been

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[41] 195 F.2d 705 (1952)

represented by the dealer. The lieutenant attempted unsuccessfully to rescind the transaction. He went to the Legal Assistance Officer, who later with other officers suggested that the dealer rescind the contract with appropriate provisions for refund. The dealer was again adamant. After due consideration General Harper, the commander at Fort Sill, issued an off-limits bulletin declaring the dealer's business off-limits. The court stated that it was well settled that if a federal officer acts or attempts to act in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him. Additionally, the court held that the President is authorized to make and publish regulations for the government of the Army which shall be enforced and obeyed until altered or revoked by the same authority. Here, regulations granted authority to commanders to declare establishments off-limits to troops for the purpose of maintaining discipline and to safeguard the health and welfare of military personnel. What is necessary for the discipline of military personnel and to safeguard their

health and welfare is to be determined by the commanding officers and not the courts.

The Judge Advocate General of the Army has also stated that a commander is authorized to issue an off-limits order to safeguard the health and welfare of his men, and that it is solely within the province of the commander to determine what is necessary for their welfare.[42]

In United States v. Porter,[43] the accused was charged with violating a general order by visiting Mexico without a pass bearing the notation that the holder was authorized to visit Mexico. The Court of Military Appeals held that this was different from and far more serious than a simple breach of restriction. The Court in looking at this order said that such an order can be couched in terms that effectively serve to proscribe a serviceman's freedom to leave a limited area. But in this case the reason for the regulation

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[42] JAGA 1967/4097, 26 June 1967

[43] 11 USCMA 170, 28 CMR 394 (1960)

was not to confine military personnel within a prescribed area but rather to circumscribe their movement to and from foreign lands where they could involve the United States Government in embarrasing situations. The court said it is to be borne in mind that travel of military personnel across an international boundary and into a foreign country - albeit one so friendly as Mexico - is fraught with many complications and numerous reasons for controlling or banning that sort of travel by members of the armed forces.

From the foregoing it can be concluded that the military commander has great authority to control where servicemen may live, frequent, do business and visit. It would appear that if it can be established that a problem detrimental to the command in regards to health, safety, morale, welfare, or the other interests of the government exists, the off-limits sanction may be used to curb this problem.

d. LIMITATIONS AS TO ACTIVITIES OF A PERSONAL NATURE

As has been shown above the military commander has abundant authority in regulating where a member

may live, visit, travel, and the safety conditions involved in these activities. Another area of interest is the day to day activities of the member. In United States v. Wilson,[44] the accused was ordered not to drink alcoholic beverages. This order was given in connection with a restriction imposed following his commission of a certain offense while under the influence. Purportedly the order was given to protecting him from further acts of misconduct while intoxicated. Wilson's commander stated that the criminal report showed that Wilson had committed the crime of stealing a tape recorder while under the influence. So the commander exercised his power and ordered the accused not to indulge in alcoholic beverages for Wilson's own good. This was to prevent a similar recurrence. The Court of Military Appeals stated that such an order was illegal. Although there were orders applicable to all personnel to prevent

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[44] 12 USCMA 165, 30 CMR 165 (1961)

them from drinking in the barracks, there was no evidence that the accused drank on duty. Moreover, the order given him was unlimited as to time or place. In the absence of circumstances tending to show its connection to military needs, an order such as this is so broadly restrictive of private rights as to be arbitrary and illegal.

In United States v. Giordano,[45] the Court of Military Appeals considered a regulation controlling the lending of money by servicemen to other servicemen. In this case two officers were backing a loan agency of their own with an enlisted agent who was charging very high rates of interest. The Court held that all activities which are reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom

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[45] 15 USCMA 163, 35 CMR 135 (1964)

responsibility of the command rests. The Court, however, did state that military personnel have legal and personal rights not subject to military orders; and orders which are arbitrary and unreasonable, or too broad and uncertain cannot be approved.

In United States v. Day,[46] two specifications alleged that the accused loaned money for a one month period at "a usurious and unconscionable rate of interest," in violation of Article 134, UCMJ. In the first specification, the amount loaned was $30.00 and the interest was $30.00. In the second, the loan was for $10.00 and the month's interest $10.00. In each instance the borrower was another soldier. The appellate defense counsel contended that usury contemplated interest in excess of a statutory rate. Military law prescribed no rate of interest and consequently, the loan specifications failed to allege and cognizable offense. The court stated:

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[46] 11 USCMA 549, 29 CMR 365 (1960)

"Whatever its ancient antecedents, in modern American law whether a particular rate of interest is usurious depends upon a statute...

"Without some definite provision limiting the rate which the lender may receive, the rate charged cannot be called usurious. 55 Am Jur, Usury, §12; 91 CJS, Usury, §5b. It follows, therefore, that since military law in general, and Army regulations in particular, provide no legal rate of interest, the exaction of any given rate cannot be described as illegal and, therefore, usurious. The interest alleged in the specifications here may indeed be unconscionable but it is not unlawful."

In United States v. Morgison,[47] a Navy board of review decision, the specification alleged usury in violation of Article 134, UCMJ. There existed a Navy Regulation which prohibited lending for profit except by permission of the commanding officer. The board stated:

"We are persuaded that the existence of Article 1260(1) does not remove the case at bar from the rule of Day, supra. The prohibition in the Article is directed against lending for profit. 'except by permission of /the/ commanding officer.'

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[47] 30 CMR 675 (1960)

> Presumably, so far as Article 1260(1) is concerned, lending even at unconscionably high interest rates would not be unlawful in cases where the permission of the commanding officer had been obtained.
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> "In the case at bar, the specifications were laid under Article 134, and allege nothing with regard to permission, or lack thereof, of the commanding officer.
>
> "The case is seen, therefore, as one in which we are bound by the holding in Day, supra."

In the author's opinion, Day states that to have an offense of usury in military law, there must be a statute or regulation defining a usurious rate of interest. Morgison states that although there was a Naval Regulation in existence, it had no effect on this case because of the manner in which the offense was alleged. Morgison also attacked the regulation.

In United States v. Martin,[48] an inspection on board the accused's vessel, which was then en route to a foreign port where American cigarettes were at a

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[48] 1 USCMA 674, 5 CMR 102 (1952)

premium and where black markets flourished, disclosed a large number of cartons of cigarettes in the accused's locker. The executive officer ordered the accused to keep the cigarettes for his personal use and not to use them for bartering. The Court held that the order prohibiting the bartering of the cigarettes was legal under the circumstances. Disorders arising out of transactions between members of the Armed Forces and nationals of other countries can be prevented by those in command even though the orders issued involve limitations on transferring of private property. In view of possible black market activities, the authority of the executive officer could reasonably include any order or regulation which would discourage the participation of American military personnel in such activities.

All activities which are reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command, and are directly connected with the maintenance of good order in the services, are subject to the control of the

officers upon whom the responsibility of the command rests; and orders regulating such activities are not rendered illegal merely because they relate to the disposition of personal property. Presumably this would be true if it involved similar acts in the United States.

In United States v. Milldebrandt,[49] accused was permitted to go on leave to straighten out his financial problems. He was ordered by his commanding officer to make a full disclosure about his personal business and dealings. The Court held that in the absence of any evidence as to the nature of the information ordered to be furnished, the order involved was so all inclusive as to be unenforceable. Assuming that an order to report about the status of indebtedness may be lawfully issued by a commanding officer, this does not mean that every order directing a member of the military to make a full disclosure about his personal

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[49] 8 USCMA 635, 25 CMR 139 (1958)

business may be valid. A command to file a complete and comprehensive report might compel a person to disclose information of a confidential or incriminating nature or of no concern to the military. Thus, the legality or illegality of such an order must be determined by its terms. Unless orders concerning personal dealings are by their terms limited to the furnishing of information which does not essentially narrow or destroy the rights and privileges granted by the code or other principles of law, they should not be considered as legal.

An area where there should be less control over the military person is outside civilian employment, popularly known as "moonlighting." The statutory provision[50] against outside civilian employment was originally intended to prevent the use of troops as

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[50] 10 U. S. C. 974 (1968) provides: "Except as provided in section 6223 of this title no enlisted member of an armed force on active duty may be ordered or permitted to leave his post to engage in a civilian pursuit or business, or a performance in civil life, for emolument, hire or otherwise, if the pursuit, business, or performance interferes with the customary or regular employment of local civilians in their art, trade, or profession."

strikebreakers. The statute itself does not place any limitation or prohibition on the enlisted members, but is directed to the military commander. As long as the enlisted member does not deprive a civilian of employment and does not neglect his military duties he should be permitted to supplement his meager military pay. The statute could be interpreted as requiring a commander to grant permission to drive in a car pool to members of his command. Such an extreme interpretation would appear to be harsh, but see United States v. Bennette[51] where a Marine sergeant was prosecuted for transporting for hire, certain personnel who were members of his command.

Paragraph 16e, Army Regulation 360-5, 27 September 1967, places certain restrictions on Army personnel participating in commercially sponsored radio-television broadcasts. The restrictions are based on the above mentioned regulation against civilian employment and the theory that if military personnel appear under

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[51] NCM 200, 9 CMR 600 (1952)

such circumstances, the Army is indorsing the product. It is difficult to believe that Private John Doe's appearance on a Coca Cola show could be interpreted as stating that the U. S. Army recommends Coca Cola. To remove such restrictions would improve the morale of the soldier. He could participate more freely as a member of the American society. Surely the present day restrictions as interpreted by the Army were not contemplated by Congress.

CHAPTER IV

CONCLUSION

The military society is composed of men and women who have a very special mission to perform. Whether they are career volunteers or serving an obligated tour, the requirement that they obey the regulations and orders of the military commander is the same. The military commander has the responsibility of assuring that the members of his command are able to perform effectively and efficiently. This necessitates that the commander regulate their activities, both off-post as well as on post, which have a bearing on their effectiveness.

The morale of the military must be maintained at the highest level possible. To accomplish this the military commander must seek out those factors which bear on morale and take affirmative measures to correct them.

Moreover, when the commander becomes aware of business practices by members of the civilian community that are detrimental to the welfare of members of the command he should make efforts to

correct such wrongs and, if necessary, impose the off-limits sanction. Perhaps this is not done only to protect the individual members of the command but also to protect the image of the command. A commander does not desire to have a group of men with the reputation of not paying their debts nor does he desire to have his men abused.

In order to promulgate orders or regulations which will be lawful, the commander must show that there is a military duty involved. The order or regulation must be sufficiently limited to define the purpose intended and must not violate the member's procedural rights. The morale, health and welfare of the command must be involved also.

It appears that the present trend is to allow the military member more freedom in his private life. This is borne out also by Major General Hodson, The Judge Advocate General of the Army at the 1968 Judge Advocate General's Conference, when he stated in effect that the soldier will be deprived only of his rights to the extent necessary to get the job done.

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