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Whatever Happened to Military Good Order and Discipline?

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WHATEVER HAPPENED TO MILITARY GOOD ORDER AND DISCIPLINE?

COLONEL JEREMY S. WEBER, USAF*

ABSTRACT

Discipline is often called “the soul of an army.” If this is so, the United States military seems to be experiencing a spiritual crisis. Article 134 of the Uniform Code of Military Justice (“UCMJ”) allows commanders to punish acts prejudicial to “good order and discipline,” but the reach of this provision has been increasingly limited in recent years. Appellate courts have repeatedly overturned convictions of conduct charged as prejudicial to good order and discipline, and in recent years, the military’s high court has issued a series of decisions limiting the reach of the UCMJ’s “general article.” Congress has also recently acted to dramatically scale back the scope of Article 134. The result is that while military leaders might talk about the criticality of maintaining good order and discipline, commanders’ authority to actually punish behavior that detracts from good order and discipline is increasingly constrained.

This Article ties the developments regarding Article 134 to a larger issue: the difficulty the military has demonstrated in defining what “good order and discipline” actually means. The term lacks an agreed-upon definition, and the military has not explored how changes in society and the military mission affect the term’s meaning. In a series of policy reforms in recent decades, military leaders have generally cited “good order and discipline” as a basis for their opposition without defining the term or substantively exploring this concept. These reforms were ultimately enacted over military leaders’ objections without any apparent impact on good order and discipline. As a result, Congress and the media have grown increasingly wary of the good order and discipline term, diminishing its rhetorical weight. The military must take a more orderly, disciplined approach to defining this term, and this Article proposes a definition as a first step toward igniting this discussion.

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I. INTRODUCTION

Lieutenant Colonel George Washington’s admonition to his Virginia Regiment Captains—“Discipline is the soul of an army”¹—is so frequently quoted that finding a writing about good order and discipline that does not refer to it is almost impossible.² Lesser known and quoted is the similar, earlier observation of the French general and military theorist, Marshal Maurice de Saxe, who observed: “[Discipline] is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will be only contemptible, armed mobs, more dangerous to their own country than to the enemy.”³

If Washington and de Saxe are correct that discipline forms the soul of a military, then the United States military seems to be experiencing a spiritual crisis. Increasingly, the public perceives the military term of art “good order and discipline” not as representing a core principle of military effectiveness, but as rhetorical “chaff”⁴ military leaders use to voice their opposition to proposed reforms without actually communicating anything.⁵ In recent years, military leaders have employed the term to voice their opposition to a number of proposed personnel, social, and legal military

¹ George Washington, *Instructions to Company Captains: General Instructions to All the Captains of Companies* (July 29, 1757), <http://founders.archives.gov/documents/Washington/02-04-02-0223>.

² See generally John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, 2000 ARMY LAW. 1, 6 (2000); William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?*, 58 A.F. L. REV. 185, 188 (2000); Andrew S. Williams, *Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 481 (2014).

³ MAURICE DE SAXE, *REVERIES UPON THE ART OF WAR* 77 (Thomas R. Phillips ed. & trans., 1944) (c. 1696–1750).

⁴ Used in this sense, “chaff” refers to “[a] passive form of electronic countermeasures consisting of expendable metallic fragments used to deceive airborne or ground based radar.” Robert A. Coe & Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F. L. REV. 49, 96 app. III (1997).

⁵ David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 4 (2013) [hereinafter Schlueter, *Justice or Discipline?*].

reforms, and they have done so without clearly explaining what good order and discipline is or why it requires a certain position on these policies.⁶ In most cases, the military ultimately enacted those reforms without any measurable negative effect on good order and discipline.⁷ As a result, the linguistic impact of the term has come under fire from Congressional leaders and the media.⁸

This battle over the meaning and weight of the good order and discipline rationale has played out most recently in calls for military justice reform. The military justice system has long represented a delicate balance between protecting command authority to maintain good order and discipline and ensuring a just system that protects the rights of servicemembers.⁹ Over the past several years, however, concern regarding military sexual assault has spurred calls for reforms that would curtail commanders' power over courts-martial and related actions.¹⁰ Despite agreeing to some modifications, military leaders have opposed proposals to remove certain prosecution decisions from the commanders of the accused servicemembers.¹¹ Military leaders have consistently cited the need to maintain good order and discipline as the basis of that opposition.¹² Thus far, those good order and discipline-based objections have proven somewhat effective; notwithstanding the numerous military justice reforms,¹³ commanders retain

⁶ See, e.g., *id.* at 54–55.

⁷ *Id.* at 5.

⁸ David A. Schlueter, *American Military Justice: Responding to the Siren Song for Reform*, 73 A.F. L. REV. 193, 224–25 (2015) [hereinafter Schlueter, *Siren Song for Reform*].

⁹ See Schlueter, *Justice or Discipline?*, *supra* note 5, at 4 (“In enacting the [Uniform Code of Military Justice], Congress struggled to balance the need for the commander to maintain discipline within the ranks against the belief that the military justice system could be made fairer, to protect the rights of servicemembers against the arbitrary actions of commanders.”).

¹⁰ See Schlueter, *Siren Song for Reform*, *supra* note 8, at 195–99 (summarizing proposals to limit or remove commanders' powers to prefer court-martial charges or convene courts-martial).

¹¹ John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 2–3 (2014).

¹² Robert Draper, *In the Company of Men*, N.Y. TIMES, Nov. 30, 2014, at MM27 (“Above all, [Senator Claire] McCaskill and military leaders contend that commanders require such prosecutorial authority, both to maintain good order and discipline and to make sure that accusers will have their day in court, even in a losing cause.”); Pauline Jelinek, *Military Sex Assault Reports Increase 46 Percent in Year; Pentagon Says It Shows More Are Coming Forward*, BOS. GLOBE, Nov. 8, 2013, at A11 (“Military leaders have argued that removing the decision from their purview would undercut the ability of officers to maintain good order and discipline in their units.”); Sig Christenson, *Panel Urges Caution in Changing Military Law*, SAN ANTONIO EXPRESS-NEWS (July 6, 2014), <http://www.expressnews.com/news/local/military/article/Panel-urges-caution-in-changing-military-law-5600619.php> (“Pentagon leaders insist the authority is needed for commanders to maintain good order and discipline.”).

¹³ Each of the last several National Defense Authorization Acts contained provisions mandating significant changes to the military justice system. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (enacting significant reforms to the military justice system, including changes to the composition of court-martial panels, an expanded role for military judges before referral of charges, and reorganization of the Uniform Code of Military Justice's punitive articles); National Defense

the authority to decide which cases do and do not get referred to trial, among other key decisions in the court-martial process.¹⁴ Still, reform efforts continue to be primarily modeled on principles of civilian justice and less on traditional notions of good order and discipline.¹⁵

Little noticed in the midst of this debate is a significant development in the military's ability to prosecute acts prejudicial to good order and discipline. Article 134 of the Uniform Code of Military Justice ("UCMJ")—one of the Code's two so-called "general articles"¹⁶—specifically prohibits any conduct that is prejudicial to good order and discipline, among other actions. Once seen as reaching an "extraordinary" range of conduct¹⁷ and representing a critical aspect of commanders' disciplinary authority, Article 134's applicability has shrunk significantly in the past few years, particularly regarding its clause on conduct prejudicial to good order and discipline.¹⁸ The result is that while military leaders talk about the importance of good order and discipline, their authority to actually punish behavior that detracts from good order

Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726, 814–15 (2015) (providing for a writ of mandamus to enforce victims' rights in a preliminary hearing or court-martial proceeding); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 533, 128 Stat. 3292, 3366–67 (2014) (requiring the service secretaries to provide special victims' counsel to victims of alleged sex-related offenses in certain circumstances); *id.* § 536, 128 Stat. at 3368 (directing the President to amend Military Rule of Evidence 404(a) to provide that the general military character of the accused is not admissible for the purpose of showing the probability of innocence of the accused for certain offenses); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952–54 (2013) (incorporating all the rights of the Crime Victims' Rights Act into the Uniform Code of Military Justice); *id.* § 1702, 127 Stat. at 954–58 (limiting a pretrial UCMJ Article 32 investigation to a preliminary hearing and limiting a convening authority's ability to alter findings and sentence at clemency).

¹⁴ Tom Brune, *Kirsten Gillibrand Military Sexual Assault Bill Fails in Senate*, NEWSDAY, Jun. 15, 2016, at 33; Bill Lambrecht, *Military Abuse Reform Fails Again to Pass*, SAN ANTONIO EXPRESS-NEWS, Jun. 17, 2015, at A1; Halimah Abdullah, *Survivors of Military Sex Assaults Frustrated with Legislation*, CNN (Mar. 10, 2014), <http://www.cnn.com/2014/03/10/politics/military-sex-assault-survivors-speak-out/>.

¹⁵ See, e.g., Nadia Klarr, *Zero Tolerance or Zero Accountability? An Examination of Command Discretion and the Need for Prosecutorial Authority in Military Sexual Assault Cases*, 41 DAYTON L. REV. 89 (2016); Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014); Greg Rustico, *Overcoming Overcorrection: Towards Holistic Military Justice*, 102 VA. L. REV. 2027 (2016).

¹⁶ See Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 43 (1975) ("Articles 133 and 134 are the 'general articles.'") (citing 10 U.S.C. §§ 933–34 (1970)). This Article refers to Article 134 as the "general article," rather than as one of two general articles, mirroring language military courts often employ for Article 134.

¹⁷ HOMER E. MOYER, JR., JUSTICE AND THE MILITARY 1051 (1972).

¹⁸ Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 323 (2007).

and discipline is increasingly constrained.¹⁹ Article 134—the great “catch-all charge”²⁰—therefore now catches less and less in its web.

This Article explores this phenomenon, focusing on the demise of Article 134’s clause regarding conduct prejudicial to good order and discipline. Section II begins with a brief history of the concept of good order and discipline in the military generally and in military law specifically, culminating in the codification of the modern UCMJ’s Article 134. Next, it demonstrates ways in which Article 134’s good order and discipline clause has proven difficult to enforce in military justice practice, and how these difficulties recently led Congress to drastically shrink the range of offenses covered under the general article. This Article then ties the developments regarding Article 134 to a larger issue: the military’s difficulty in defining what good order and discipline means. To address this situation, this Article proffers a comprehensive definition of the term that military leaders can use to specifically ground their positions and proffers that the military justice system can better specify what conduct is and is not prohibited under Article 134. This Article concludes with a brief discussion of what the demise of Article 134 might mean for the military in future policy clashes and what the military needs to do to better articulate its good order and discipline-based positions.

II. “GOOD ORDER AND DISCIPLINE”—THE CENTRAL QUESTION

A. Good Order and Discipline in Military Law

For centuries, military leaders have recognized that discipline is a fundamental basis for military effectiveness. Sun Tzu listed “[o]n which side is discipline most rigorously enforced” as one of his seven considerations for predicting the victor in a conflict.²¹ The Roman writer Vegetius detailed the importance of military discipline at length, including his opening observation: “Victory in war . . . does not depend entirely upon numbers or mere courage; only skill and discipline will insure [sic] it.”²² George Washington was not the only early American leader to emphasize the need to maintain discipline; John Adams also recognized that there cannot be “happiness or safety in an army for a single hour when discipline is not observed.”²³ The emphasis on discipline has carried over to the nineteenth and twentieth centuries, as military leaders ranging from Scott to Sherman to MacArthur noted the importance of discipline in military organizations.²⁴ More recently, the Air Force’s top military lawyer wrote that good order and discipline is the “fourth element of combat

¹⁹ *Id.* at 324–25.

²⁰ *Id.* at 323.

²¹ SUN TZU, *THE ART OF WAR* 6 (Lionel Giles trans., Thrifty Books 2009) (1910) (c. 500–400 B.C.E.).

²² FLAVIUS VEGETIUS RENATUS, *THE MILITARY INSTITUTIONS OF THE ROMANS (DE RE MILITARI)* 9 (John Clarke trans., Greenwood Press 1944) (1767) (c. 390) [hereinafter VEGETIUS].

²³ JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980* 3 (rev. & abr. ed., University Press of Kansas 2001) (1992) (quoting John Adams).

²⁴ LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 3 (2010).

effectiveness,” alongside people, training, and equipment.²⁵ The Navy’s top enlisted member penned, “[v]ery few things have a greater impact on warfighting readiness and our ability to accomplish mission than Good Order [and] Discipline.”²⁶ Modern military regulations repeatedly stress to commanders the central importance of maintaining good order and discipline.²⁷

Military justice was established to help effect good order and discipline.²⁸ Criminal military codes have long supported the imposition of discipline upon armed forces.²⁹ Codes to impose punishment for disciplinary infractions date back to Richard the Lionheart in 1190, Richard II in 1385, and Swedish king Gustavus Adolphus in the seventeenth century.³⁰ For much of its history, “military justice” was seen as an oxymoron; the system existed to bend to the will of the commander who was charged with maintaining good order and discipline, and any “justice” that the system achieved was more or less accidental.³¹ Post-World War II reforms in the United States sought to change this by creating a more just and less arbitrary system that better protected servicemembers’ rights.³² However, the reforms sought to achieve this goal without sacrificing commanders’ ability to maintain good order and discipline.³³ As the preamble to the *Manual for Courts-Martial* notes, “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”³⁴ Even today, the focus on good order and discipline remains despite the fact that modern reforms have led to a court-

²⁵ Richard C. Harding, *A Revival in Military Justice*, 37 REPORTER 1, 5 (2010).

²⁶ Mike Stevens, *Zeroing in on Excellence: Good Order and Discipline (Part 4)*, NAVY LIVE BLOG (Nov. 23, 2012), <http://navylive.dodlive.mil/2012/11/23/zeroing-in-on-excellence-good-order-and-discipline-part-4/>.

²⁷ See, e.g., U.S. Air Force Instruction No. 1–1, *Air Force Culture* ¶ 2.1 (Aug. 7, 2012) [hereinafter AFI 1–1] (“Maintaining good order and discipline is paramount for mission accomplishment”); U.S. Dep’t of Army, Army Reg. 600–20, *Army Command Policy* ¶ 4–12 (Nov. 6, 2014) [hereinafter AR 600–20] (“It is the commander’s responsibility to maintain good order and discipline in the unit. Every commander has the inherent authority to take appropriate actions to accomplish this goal.”).

²⁸ Charles J. Dunlap, Jr., *Military Justice*, in THE MODERN AMERICAN MILITARY 243 (David M. Kennedy ed., 2015).

²⁹ *Id.* at 242 (“Just as military music has served a martial purpose for eons—trumpets did a pretty good job for Joshua and the Israelites at the battle of Jericho—so too has military justice served war fighters since virtually the beginning of organized conflict, because it plays a central role in establishing the discipline indispensable for martial success.”).

³⁰ MORRIS, *supra* note 24, at 2.

³¹ WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 49–50 (2d rev. & enlarged ed. 1920) (1886), https://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf.

³² Schlueter, *Justice or Discipline?*, *supra* note 5, at 4.

³³ *Id.*

³⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2016 ed.) [hereinafter MCM].

martial system that “looks and works more like civilian courts than it did through most of its history”³⁵

The need to maintain good order and discipline has been used to justify different procedures in the military justice system. The military justice system places commanders in the central disciplinarian role,³⁶ and the system does not afford servicemembers the same rights afforded civilians.³⁷ Winning wars remains a primary goal of the military justice system; a system aimed at promoting military effectiveness will always look somewhat different from one not burdened by such a unique and difficult objective. As voiced in 1974, the doctrine that posits that letting ninety-nine guilty men go free is better than convicting one innocent man “is not easily squared with the need to maintain efficiency, obedience and order in an army, which is an aggregation of men (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons.”³⁸ Perhaps the most famous exposition of this reality comes from the Vietnam War-era book *Military Justice Is to Justice as Military Music Is to Music*:

It is one of the ironies of patriotism that a man who is called to the military service of his country may anticipate not only the possibility of giving up his life but also the certainty of giving up his liberties.

Historically, the man in uniform has been viewed as the property of his commanding officer, to be fed, clothed, rewarded and punished as the commander believed appropriate for the preparation for war and the waging of it. The serviceman has had to bend his personal life to what even such a libertarian as Chief Justice Warren tolerantly viewed as the “military necessity” for absolute discipline, order and conformity. If the serviceman does not bend, his commander—with the approval of the federal government—can break him at will.³⁹

Despite its attempts to provide servicemembers with greater rights and protections, the military justice system still aims to serve commanders first by providing a means to

³⁵ CHRIS BRAY, *COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND*, at xii–xiii (2016).

³⁶ Currently and historically, a lower-level commander “preferred” charges by initially serving charges on the accused, while a more senior commander has served as the “convening authority,” referring the case to trial, deciding matters such as whether to accept a pretrial agreement, and ultimately approving or modifying the results of the trial. *See* MCM, *supra* note 34, at pt. II, Rule for Courts-Martial 307(a) (describing who may prefer charges); MCM, *supra* note 34, at pt. II, Rule for Courts-Martial 705 (describing procedures for processing pretrial agreements); UNIF. CODE MIL. JUST. arts. 22–24 (codified at 10 U.S.C. §§ 822–24 (2016)) (describing who may convene courts-martial) [hereinafter UCMJ]; UCMJ art. 60(c) (codified at 10 U.S.C. § 860(c) (2016)) (describing, before 2014 reforms, the convening authority’s ability to, “in his sole discretion” and as “a matter of command prerogative,” modify the findings or sentence of the court-martial).

³⁷ Most notably, service members lack the right to a jury trial under the Sixth Amendment in courts-martial. Williams, *supra* note 2, at 476–77.

³⁸ JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 23 (1974).

³⁹ ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 1 (rev. ed. 1970).

punish acts that impair good order and discipline. One of the primary means by which it does so is through the “general article,” UCMJ Article 134.

B. Good Order and Discipline in UCMJ Article 134

In the seventeenth and eighteenth centuries, the idea of a “general article” that would criminalize a broad range of conduct not otherwise punishable took root.⁴⁰ First appearing in the Articles of War for 1625, the British general article took a number of forms, generally prohibiting “disorders,” “abuses,” or “offenses” not otherwise specified in military law.⁴¹ Likewise, in 1621, the Swedish Articles contained a general article making punishable “[w]hatsoever is not contained in these Articles, and is repugnant to Military Discipline,” among other matters.⁴² By 1765, the British Articles of War tacked on the words “good order” to “discipline,” prohibiting conduct “to the Prejudice of good Order and Military Discipline.”⁴³ The pairing stuck, and the term “good order and discipline” remains in use to this day.

United States military law soon followed suit. A 1974 law review article noted: “With but minor variations, the General Article has been a part of the law governing military personnel from the very beginning of our national existence”⁴⁴ In the era before the modern UCMJ, the Army and Navy each had its own military code, and each had a general article.⁴⁵ At first, the Army’s general article only prohibited acts prejudicial to good order and discipline without reference to service-discrediting conduct. The 1890 *Manual for Courts-Martial*, for example, contained a code of military justice for the Army that prohibited “all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline”⁴⁶ By World War I, the Army code added service-discrediting conduct and all crimes or offenses not capital to the prohibition against “all disorders and neglects to the prejudice of good order and military discipline”⁴⁷

The general article survived post-World War II military justice reforms.⁴⁸ The new UCMJ, which applied to all the services, adopted the Army code’s general article, including its prohibition against all disorders and neglects to the prejudice of good

⁴⁰ D.B. Nichols, *The Devil’s Article*, 22 MIL. L. REV. 111, 113 (1963).

⁴¹ *Id.*

⁴² *Id.* at 115; WINTHROP, *supra* note 31, at 914.

⁴³ WINTHROP, *supra* note 31, at 946.

⁴⁴ Paul T. Fortino, *Article 134 of the UCMJ: Will AVERECH Mean Taps for the General Article*, 50 NOTRE DAME. L. REV. 158, 158 (1974).

⁴⁵ *Id.* at 159.

⁴⁶ INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES 47 art. 62 (1890), https://www.loc.gov/tr/frd/Military_Law/pdf/manual-1890.pdf.

⁴⁷ A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY AND OF OTHER PROCEDURE UNDER MILITARY LAW 281 art. 96 (1918), https://www.loc.gov/tr/frd/Military_Law/pdf/manual-1918.pdf.

⁴⁸ For an overview of reforms made to the military justice system after World War II, see LURIE, *supra* note 23, at 76–154. For extensive documentation detailing the legislative history of the creation of the modern UCMJ, see LIBRARY OF CONGRESS, *Uniform Code of Military Justice Legislative History*, MIL. LEGAL RESOURCES (Apr. 2, 2013), https://www.loc.gov/tr/frd/Military_Law/UCMJ_LHP.html.

order and discipline in the armed forces.⁴⁹ Like earlier versions in the Articles of War, the article also punishes conduct “of a nature to bring discredit upon the armed forces” as well as non-capital, civilian offenses that may be assimilated into the article.⁵⁰ Article 134 remains today in substantially the same form as it did when enacted.⁵¹ Penalties for violating the general article’s conduct prejudicial to good order and discipline or service-discrediting provision vary widely, depending on the specific conduct involved.⁵²

The provision criminalizing conduct prejudicial to good order and discipline proved the most controversial aspect of the UCMJ’s general article. Its broad scope has long been recognized as the “most comprehensive and potentially most subject to abuse; hence its traditional British nickname, ‘the Devil’s Article.’”⁵³ Writing just a few years into the modern UCMJ’s existence, the man who would later become the chief judge of the military justice system’s highest court noted that “[t]remendous flexibility—and perhaps some vagueness—is incorporated” by Article 134.⁵⁴ That same jurist elsewhere noted, in an article titled “Article 134, Uniform Code of Military Justice—A Study in Vagueness,” that the general article, particularly the prohibition against conduct prejudicial to good order and discipline, operates with “awesome generality” such that its “true meaning might baffle the examination of the most skilled

⁴⁹ UCMJ art. 134 (codified at 10 U.S.C. § 934 (1950)); *see also* Fortino, *supra* note 44, at 159 (“When formulating one law for the governance of all military forces, Congress chose the wording of the Army version and reenacted nearly verbatim Article 96 of the Articles of War, 1916, into Article 134 of the UCMJ . . .”).

⁵⁰ UCMJ art. 134 (codified at 10 U.S.C. § 934 (1950)).

⁵¹ UCMJ art. 134 (codified at 10 U.S.C. § 934 (2016)).

⁵² The *Manual for Courts-Martial* lists several examples of offenses that may be charged under Article 134, each listing its own maximum punishment. These maximum punishments can vary significantly based on the underlying conduct. Assault with intent to commit murder or rape, for example, is punishable by a dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty years. MCM, *supra* note 34, pt. IV, ¶ 64e. Drunk and disorderly conduct not committed aboard ship or under circumstances to bring discredit upon the military service is punishable by confinement for three months and forfeiture of two-thirds pay per month for three months. *Id.* pt. IV, ¶ 73e(3)(c). For an Article 134 offense not listed under the *Manual for Courts-Martial* “which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however, if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offense.” *Id.* pt. II, Rule for Courts-Martial 1003(c)(1)(B)(i). Article 134 offenses that are not specifically listed in the *Manual for Courts-Martial*, that are not closely related to or included in a listed offense, and that do not describe acts criminal under the U.S. Code or that have no maximum punishment authorized by custom of the service are punishable as a general or simple disorder, with a maximum sentence of confinement for four months and forfeiture of two-thirds pay per month for four months. *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011).

⁵³ Michael Noone, *Justice, Military: Military Crimes*, in *THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY* 356, 357 (John Whiteclay Chambers II ed., 1999); Nichols, *supra* note 40, at 112.

⁵⁴ ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 63 (1956).

lawyer.”⁵⁵ In 1972, a prominent military justice treatise suggested that “although the general articles may not rise to the level of unconstitutionality they may nonetheless be the source of significant unfairness and may not be necessary to fulfill the purposes for which they were originally designed.”⁵⁶ Even the former Judge Advocate General of the Army, writing shortly after his retirement, called for the abolition of Article 134, opining that the general article was unconstitutionally vague.⁵⁷ He observed: “We don’t really need it, and we can’t defend our use of it in this modern world.”⁵⁸

Not surprisingly, the article, particularly the provision regarding conduct prejudicial to good order and discipline, faced challenges in the improved appellate system created by the modern UCMJ.⁵⁹ In a case soon after the codification of the modern UCMJ, the nation’s highest military appellate court admitted that the first two clauses of Article 134 (prohibiting conduct prejudicial to good order and discipline and service-discrediting conduct) presented “the conceivable presence of uncertainty.”⁶⁰ However, the court held that “we do not perceive in the Article vagueness or uncertainty to an unconstitutional degree,” noting that similar provisions had long been common in military law.⁶¹ The court thus held that, judging the article in historical context, “the clauses under scrutiny have acquired the core of a settled and understandable content of meaning,” particularly because the article listed numerous examples of acts that would constitute an offense under the general article.⁶² Over the ensuing years, military courts limited the scope of the article’s applicability,⁶³ but also continued to reject vagueness challenges to the general article.⁶⁴ The Supreme Court ultimately agreed two decades later.

In 1974, the Supreme Court faced the question about whether the general article—along with its companion article criminalizing conduct unbecoming an officer and a

⁵⁵ Robinson O. Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C. L. REV. 142, 142 (1958).

⁵⁶ MOYER, *supra* note 17, at 1053.

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

⁵⁸ *Id.*

⁵⁹ See generally James A. Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960) (detailing early challenges to the general article in the Court of Military Appeals).

⁶⁰ *United States v. Frantz*, 7 C.M.R. 37, 39 (C.M.A. 1953).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *United States v. Holiday*, 16 C.M.R. 28, 30 (C.M.A. 1954) (“Suffice it to say that the Article contemplates only the punishment of that type of misconduct which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline.”); *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953) (holding that “Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the Punitive Articles.”); *United States v. Smart*, 12 C.M.R. 826 (A.F.B.R. 1953) (holding that a breach of custom may result in a violation of clause 1 of Article 134 if it satisfies the following requirements: (1) the accused violated a long-established practice; (2) the custom reflected common usage attaining the force of law; (3) the custom was not contrary to military law; and (4) the custom ceases when observance has been abandoned).

⁶⁴ *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964); *Frantz*, 7 C.M.R. at 39.

gentleman⁶⁵—was unconstitutionally vague. *Parker v. Levy*⁶⁶ was not the first Supreme Court decision on the constitutionality of such a provision; the Court had ruled more than one hundred years earlier that the Navy’s general article, despite “the apparent indeterminateness of such a provision . . . is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army”⁶⁷ However, *Levy* is the most significant case involving the modern Article 134. In *Levy*, an Army physician under a two-year military service agreement during the Vietnam War was court-martialed for various offenses arising from his refusal to conduct dermatology training for Special Forces and his anti-war public statements to enlisted personnel.⁶⁸ The relevant specifications charged that his actions were prejudicial to good order and discipline and constituted conduct unbecoming an officer and a gentleman.⁶⁹ Captain Levy appealed his conviction, arguing that Articles 133 and 134 both were unconstitutionally vague and facially invalid due to their overbreadth.⁷⁰

The Court rejected both challenges.⁷¹ Citations to *Levy* more often focus on its holding that the statutes are not overbroad because the First Amendment rights of servicemembers must sometimes yield to the demands of military discipline.⁷² However, the opinion is equally significant for its holding that Articles 133 and 134—including Article 134’s conduct prejudicial to good order and discipline clause—are not unconstitutionally vague.⁷³ In so holding, the Court found that Captain Levy had “fair notice from the language of each article that the particular conduct which he engaged in was punishable.”⁷⁴ The Court acknowledged that “[i]t would be idle to pretend that there are not areas within the general confines of the articles’ language which have been left vague,” and noted the possibility that “sizeable areas of

⁶⁵ UCMJ art. 133 (codified at 10 U.S.C. § 933 (2016)).

⁶⁶ See generally *Parker v. Levy*, 417 U.S. 733 (1974).

⁶⁷ *Dynes v. Hoover*, 61 U.S. 65, 82 (1858).

⁶⁸ *Levy*, 417 U.S. at 736.

⁶⁹ *United States v. Levy*, 39 C.M.R. 672, 674 (A.B.R. 1968).

⁷⁰ *Levy*, 417 U.S. at 741–42.

⁷¹ *Id.* at 741.

⁷² *Id.* at 758 (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”). In the past five years, 117 law review articles and other legal journals have cited the majority’s holding, including 16 pieces that quoted the passage referred to here. See, e.g., Rodrigo M. Caruço, *Treating Members of the Military at Least as Well as Inmates and Students: Determining When Military Necessity Requires Infringing Upon Constitutional Rights in Cases Before the Court of Appeals for the Armed Forces*, 46 U. MEM. L. REV. 61, 89 (2015); Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 NEW ENG. L. REV. 21, 64 (2015); Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 103 (2013).

⁷³ *Levy*, 417 U.S. at 740.

⁷⁴ *Id.* at 756.

uncertainty as to the coverage of the articles may remain.⁷⁵ Nonetheless, the Court also noted that judicial limitations on the application of the articles, along with other “authoritative military sources,” had interpreted the scope of the articles.⁷⁶ The Court held that “less formalized custom and usage” could fill any further areas of uncertainty.⁷⁷ The Court drew attention to the sample specifications that Article 134 lists in the *Manual for Courts-Martial* as well as military appellate decisions, finding a “substantial range of conduct” to which Article 134 may properly apply “without vagueness or imprecision.”⁷⁸

The concurring and dissenting opinions in *Levy* disagreed as to whether modern military members still possessed a clear understanding of the meaning of “prejudicial to good order and discipline.” Justice Blackmun and Chief Justice Burger concurred that the general articles are constitutional, asserting that the good order and discipline term is so ingrained in military members’ mindset that its meaning is plain and timeless:

My Brother Stewart [author of the dissenting opinion] complains that men of common intelligence must necessarily speculate as to what “conduct unbecoming an officer and a gentleman” or conduct to the “prejudice of good order and discipline in the armed forces” or conduct “of a nature to bring discredit upon the armed forces” really means. He implies that the average soldier or sailor would not reasonably expect, under the general articles, to suffer military reprimand or punishment for engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers. He argues that “times have surely changed” and that the articles are “so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them.”

These assertions are, of course, no less judicial fantasy than that which the dissent charges the majority of indulging. In actuality, what is at issue here are concepts of “right” and “wrong” and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life.

In my judgment, times have not changed in the area of moral precepts. Fundamental concepts of right and wrong are the same now as they were under the Articles of the Earl of Essex (1642), or the British Articles of War of 1765, or the American Articles of War of 1775, or during the long line of precedents of this and other courts upholding the general articles. And, however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force.

....

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 754.

Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal. The truth is that the moral horizons of the American people are not footloose The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right.⁷⁹

The dissenting justices took a different view about the immutability of the term. Justice Stewart, joined by Justices Douglas and Brennan, took the position that even if the idea of good order and discipline was once well understood, this does not mean this understanding remains fixed for all time.⁸⁰ Rather, Stewart wrote, “I find it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain general articles.”⁸¹ He first noted that judges, scholars, and military publications had struggled to define the terms outlined in the general articles, including conduct prejudicial to good order and discipline.⁸² He then examined whether modern military members really understood such terms:

It might well have been true in 1858 or even 1902 that those in the Armed Services knew, through a combination of military custom and instinct, what sorts of acts fell within the purview of the general articles. But times have surely changed. Throughout much of this country’s early history, the standing army and navy numbered in the hundreds. The cadre was small, professional, and voluntary. The military was a unique society, isolated from the mainstream of civilian life, and it is at least plausible to suppose that the volunteer in that era understood what conduct was prohibited by the general articles.

It is obvious that the Army into which Dr. Levy entered was far different. It was part of a military establishment whose members numbered in the millions, a large percentage of whom were conscripts or draft-induced volunteers, with no prior military experience and little expectation of remaining beyond their initial period of obligation. Levy was precisely such an individual, a draft-induced volunteer whose military indoctrination was minimal, at best. To presume that he and others like him who served during the Vietnam era were so imbued with the ancient traditions of the military as to comprehend the arcane meaning of the general articles is to engage in an act of judicial fantasy. In my view, we do a grave disservice to citizen soldiers in subjecting them to the uncertain regime of Arts. 133 and 134 simply because these provisions did not offend the sensibilities of the federal judiciary in a wholly different period of our history. In today’s vastly “altered historic environment,” [precedent supporting the majority’s

⁷⁹ *Id.* at 762–65 (Blackmun, J., concurring) (internal citations omitted).

⁸⁰ *Id.* at 773. (Stewart, J., dissenting).

⁸¹ *Id.* at 774 (Stewart, J., dissenting).

⁸² *Id.* at 777–78, 777 n.12, 778 n.13.

holding] have become constitutional anachronisms, and I would retire them from active service.⁸³

The majority's holding remains good law, and both Articles 133 and 134 remain in effect to this day.⁸⁴ The holding has survived because "application of Article 134 has been limited by the President through the Manual for Courts-Martial, by the military appellate courts through case law, and by long established military custom and tradition to behavior that is easily recognized by [servicemembers] as subject to punitive sanction."⁸⁵ However, persisting issues continue to raise the question of whether the contours of the "good order and discipline" term are really understood, or, as the dissent held, whether the military has changed to the extent that good order and discipline now represents a nebulous concept.

III. ARTICLE 134—THE LONG RETREAT

Article 134 may have withstood Supreme Court scrutiny, but it did so only after early decisions by military courts limited its application and after the Supreme Court itself noted the law was subject to limitations by judicial and administrative interpretation.⁸⁶ The limitations to the general article's reach, particularly its prohibition against conduct prejudicial to good order and discipline, have only amplified in the decades since *Levy*. Appellate courts overturned numerous Article 134 convictions for failure to demonstrate that the appellant's conduct was in fact prejudicial to good order and discipline.⁸⁷ In recent years, the Court of Appeals for the Armed Forces ("CAAF") has taken steps to significantly limit the scope of Article 134, leading to widespread reversals of court-martial convictions.⁸⁸ Perhaps because of these difficulties, Congress recently has taken steps to significantly scale back the types of offenses charged under Article 134.⁸⁹ The scope of the prejudicial to good order and discipline clause appears very much in doubt.

A. Offenses Prejudicial to Good Order and Discipline and the Proof Problem: Appellate Review

The government continues to charge servicemembers with offenses under the "prejudicial to good order and discipline" clause, and servicemembers continue to be convicted of such offenses.⁹⁰ When appellate courts review those cases, however, the

⁸³ *Id.* at 781–83 (footnotes omitted).

⁸⁴ UCMJ art. 133 (codified at 10 U.S.C. §933 (2016)); UCMJ art. 134 (codified at 10 U.S.C. § 934 (2016)).

⁸⁵ *United States v. Orellana*, 62 M.J. 595, 599 (N-M. Ct. Crim. App. 2005) (quoting *United States v. Peszynski*, 40 M.J. 874, 879 (N-M.C.M.R. 1994)).

⁸⁶ *Levy*, 417 U.S. at 740.

⁸⁷ *See, e.g., United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

⁸⁸ *See, e.g., United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

⁸⁹ *See generally* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 5187, 130 Stat. 2000 (2016).

⁹⁰ *See, e.g., United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

continuing struggle to understand the meaning and reach of “prejudicial to good order and discipline” becomes evident.

The problem of the clause’s ambiguity particularly presents itself in military courts’ review of guilty pleas to offenses charged as prejudicial to good order and discipline. In court-martial practice, an accused who pleads guilty must specifically admit to his or her misconduct so that the military judge may determine that the actions the accused admits to actually constitute the charged offense(s).⁹¹ In conducting this inquiry, the military judge must determine whether there is an “adequate basis in law and fact to support the plea before accepting it.”⁹² The military judge must explain the offenses to the accused and ensure the accused understands the elements of the offense, including the definition of terms contained in those elements.⁹³ Appellate courts review a military judge’s decision to accept a guilty plea for an abuse of discretion by determining whether the record shows a substantial basis for questioning the plea.⁹⁴

Instances of appellate courts overturning a military judge’s acceptance of a guilty plea normally are fairly rare,⁹⁵ but when conduct allegedly is prejudicial to good order and discipline under Article 134, military courts have recurrently overturned convictions.⁹⁶ Despite the deferential standard of review on such issues, a search of military appellate decisions revealed at least twenty-one cases since 1990 in which courts have overturned guilty pleas under Article 134’s good order and discipline clause.⁹⁷ These cases expose a repeating pattern of accused servicemembers struggling to explain *why* they believed their conduct prejudiced good order and discipline.⁹⁸ Likewise, in these cases, military judges generally have lacked the ability to help accused members articulate this point.⁹⁹

United States v. Caldwell is a recent and illustrative example of this problem.¹⁰⁰ In *Caldwell*, the accused pled guilty to wrongful self-injury in connection with a failed suicide attempt in his barracks room.¹⁰¹ This offense was charged under Article 134 as

⁹¹ MCM, *supra* note 34, pt. II, Rule for Courts-Martial 910 (c)–(e); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

⁹² *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

⁹³ MCM, *supra* note 34, pt. II, Rule for Courts-Martial 910(c)(1) and Discussion; *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

⁹⁴ *Jordan*, 57 M.J. at 238.

⁹⁵ Cf. John F. O’Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175, 194–95 (2008) (explaining the requirement for the providence inquiry and observing that, while “military appellate courts have long allowed accused who pleaded guilty at trial to argue on appeal that their conviction should be overturned,” the standard for overturning a conviction is “relatively high.”).

⁹⁶ See, e.g., *Jordan*, 57 M.J. at 239.

⁹⁷ See, e.g., *id.*

⁹⁸ See, e.g., *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013).

⁹⁹ *Id.* at 142.

¹⁰⁰ *Id.* at 137.

¹⁰¹ *Id.* at 140–41.

either prejudicing good order and discipline or being of a nature to bring discredit upon the armed forces.¹⁰² During the providence inquiry, the military judge noted that the self-injury was an “odd charge” and asked the accused to explain why his suicide attempt should be considered criminal.¹⁰³ The accused replied:

[A] lot of people were shocked. A lot of people didn't know how to react towards it [s]o they would kind of talk to me a little bit and then back away. It was a touchy subject no one wanted to speak about. [I]t was just really weird for a couple weeks after that, sir.¹⁰⁴

Further attempts at clarification revealed little additional information about why the self-injury attempt could be considered prejudicial to good order and discipline or service-discrediting.¹⁰⁵ After a divided intermediate appellate court reversed the conviction only to reverse itself en banc,¹⁰⁶ CAAF found the plea improvident.¹⁰⁷ The court did find that a suicide attempt could constitute a criminal offense under Article 134 and recognized that the suicide attempt of the accused was bona fide.¹⁰⁸ Nonetheless, the court found the accused's explanation was insufficient to establish a “reasonably direct and palpable injury to good order and discipline.”¹⁰⁹

In *United States v. Jordan*, CAAF reversed an unlawful entry conviction when the military judge supplied “mere conclusions of law” in response to questions about whether his conduct was prejudicial to good order and discipline.¹¹⁰ In another case, the accused pled guilty to breaking restriction under the prejudicial to good order and discipline clause, but the military judge questioned him about whether the accused's conduct was service-discrediting.¹¹¹ CAAF set aside the finding of guilty.¹¹²

The intermediate service courts of criminal appeals have been active in overturning guilty pleas involving conduct charged as prejudicial to good order and discipline. For example, in *United States v. Barnes*, the Army Court of Criminal Appeals overturned a charge of carrying a concealed weapon based on the accused's failure to explain how his conduct prejudiced good order and discipline (“Because it doesn't show discipline that we have as Soldiers”).¹¹³ In *United States v. Thatch*, the Navy-Marine Corps Court

¹⁰² *Id.* at 138.

¹⁰³ *Id.* at 141.

¹⁰⁴ *Id.* at 139.

¹⁰⁵ *Id.* at 142.

¹⁰⁶ *United States v. Caldwell*, No. NMCCA 201000557, 2011 CCA LEXIS 181, at *2 (N-M. Ct. Crim. App. Nov. 15, 2011).

¹⁰⁷ *Id.*

¹⁰⁸ *Caldwell*, 72 M.J. at 141.

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)).

¹¹¹ *United States v. Evans*, 73 M.J. 410 (C.A.A.F. 2014) (summary disposition).

¹¹² *Id.*

¹¹³ *United States v. Barnes*, No. ARMY 20130529, 2014 CCA LEXIS 187, 2014 WL 1247146 at *4 (A. Ct. Crim. App. Mar. 21, 2014).

of Criminal Appeals overturned a conviction for being drunk on station for the same deficiency, where the accused's only statement to establish the prejudicial to good order and discipline element was his bare admission in response to a judge's yes or no question.¹¹⁴ The Army overturned a conviction for communicating a threat, reasoning that the accused's statement ("As a Soldier I'm supposed to have better control of my feelings and at that time I showed a total lack of control") failed to establish prejudice to good order and discipline.¹¹⁵ The Army's appellate court has been particularly active in this area as well, overturning or at least amending convictions on similar grounds in cases involving, for example, wrongful distribution of state controlled drugs,¹¹⁶ possession and importation of drugs,¹¹⁷ indecent liberties with a child,¹¹⁸ indecent language toward a child,¹¹⁹ a tattoo of a marijuana leaf,¹²⁰ and numerous cases involving possession of child pornography.¹²¹ In several other cases, appellate courts upheld Article 134 convictions, but either did so through split decisions or through opining that the accused's statements "narrowly" or "barely" established the prejudicial to good order and discipline element.¹²² This critical look at convictions under the good order and discipline clause seems to be increasing; in recent years, a disproportionate number of cases have overturned such convictions, perhaps indicating a growing frustration by appellate courts with the lack of clarity in this area.

¹¹⁴ United States v. Thatch, 30 M.J. 623, 624 (N-M.C.M.R. 1990).

¹¹⁵ United States v. Hale, No. ARMY 20121020, 2015 CCA LEXIS 59, at *3-4 (A. Ct. Crim. App. Feb. 13, 2015).

¹¹⁶ United States v. Dallman, 32 M.J. 624 (A.C.M.R. 1991).

¹¹⁷ United States v. Stener, 14 M.J. 972 (A.C.M.R. 1982).

¹¹⁸ United States v. Parker, No. ARMY 20120713, 2014 CCA LEXIS 651 (A. Ct. Crim. App. Aug. 27, 2014).

¹¹⁹ United States v. Kelly, No. ARMY 20120990, 2014 CCA LEXIS 921 (A. Ct. Crim. App. Aug. 26, 2014).

¹²⁰ United States v. Arizmendi, No. ARMY 20110966, 2013 CCA LEXIS 552, 2013 WL 3480276 (A. Ct. Crim. App. July 1, 2013).

¹²¹ United States v. Doherty, No. ARMY 20160390, 2016 CCA LEXIS 702 (A. Ct. Crim. App. Dec. 2, 2016); United States v. Lopez, No. ARMY 20140891, 2016 CCA LEXIS 25 (A. Ct. Crim. App. Jan. 21, 2016); United States v. Haddox, No. ARMY 20140123, 2015 CCA LEXIS 371 (A. Ct. Crim. App. Aug. 24, 2015); United States v. Knight, No. ARMY 20130432, 2015 CCA LEXIS 255 (A. Ct. Crim. App. June 17, 2015); United States v. Lacefield, No. ARMY 20120598, 2014 CCA LEXIS 84, 2014 WL 642950 (A. Ct. Crim. App. Feb. 19, 2014).

¹²² See, e.g., United States v. Groomes, No. ACM 38360, 2014 CCA LEXIS 752 (A.F. Ct. Crim. App. Oct. 2, 2014) (affirming, in a 2-1 decision, convictions of child endangerment and obstruction of justice despite rejecting one of the potential bases supporting the plea to the obstruction of justice plea); United States v. Ray, No. ACM S31431, 2009 CCA LEXIS 57, *7 (A.F. Ct. Crim. App. Feb. 13, 2009) (holding, in a 2-1 decision, that the appellant's plea to use of methylene was provident); United States v. Nance, No. ACM S31445, 2008 CCA LEXIS 347 (A.F. Ct. Crim. App. Sept. 12, 2008) (finding, in a 2-1 decision, that appellant providently pled guilty to wrongful use of Coricidin HMP Cough and Cold medicine), *aff'd* 67 M.J. 362 (C.A.A.F. 2009); United States v. Deggs, No. ARMY 20020133, 2005 CCA LEXIS 473, at *7-9 (A. Ct. Crim. App. Feb. 15, 2005) (upholding a guilty plea for dishonorably failing to maintain sufficient funds for payment of checks despite a "bare bones" providence inquiry and a "minimally adequate" factual basis).

Adultery presents a special class of cases in which courts have closely scrutinized—and occasionally overturned—guilty pleas for conduct allegedly prejudicial to good order and discipline. Adultery is one of several enumerated offenses under Article 134; it may be charged as an act prejudicial to good order and discipline or service-discrediting.¹²³ The adultery offense was specifically added to Article 134 in 1984.¹²⁴ By the 1990s, about 900 men and women were court-martialed for adultery.¹²⁵ Until 2002, no special rules applied to adultery cases; the general requirement to prove conduct prejudicial to good order and discipline or conduct of a nature to bring discredit upon the armed forces applied to adultery cases as with any other Article 134 offense.¹²⁶

However, President George W. Bush amended the *Manual for Courts-Martial* in 2002 to create a separate explanation of the terminal element applicable only to adultery offenses.¹²⁷ The amended provision now sets forth the following with regard to proving that adultery is prejudicial to good order and discipline:

Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;
- (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, or efficiency;
- (h) Whether the accused or co-actor was legally separated; and

¹²³ See MCM, *supra* note 34, pt. IV, ¶ 62.

¹²⁴ Katherine Annuschat, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1173 (2010).

¹²⁵ *Id.* at 1164.

¹²⁶ See MCM, *supra* note 34, pt. IV, ¶¶ 62(c)(2), 62(c)(2)(a)–(i) (2002 ed.).

¹²⁷ Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002).

(i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.¹²⁸

This new language represented a “narrowing of the scope of the offense under the UCMJ,”¹²⁹ making charging—and convicting—for acts of adultery more difficult for the military.¹³⁰ Even with these changes, however, concern remains that these factors “have not yet been effective at stopping the arbitrary prosecution of adultery in the military.”¹³¹

Likewise, the factors have not obviated the need for courts to overturn adultery convictions. In *United States v. Freeberg*, the trial judge asked the appellant how he thought his adultery prejudiced good order and discipline.¹³² The best the appellant could muster was, “I guess the best I can say is perception is reality. I’m sure that somebody that I was working with or somebody at the command, you know, knew that I was married and the fact that I was having an affair with a fellow Marine looked badly upon myself and my credibility.”¹³³ The Navy-Marine Corps Court held this did not suffice and set aside the adultery conviction.¹³⁴ Likewise, the Coast Guard Court of Criminal Appeals overturned an appellant’s guilty plea conviction for adultery in *United States v. Jonsson*.¹³⁵ In that case, the appellant proffered in his providence inquiry that his adultery was prejudicial to good order and discipline:

ACC: Because my command knew I was married, sir, and I had sexual intercourse with a seaman who I was directly supervising, sir.

MJ: All right. How about suppose other seamen who are part of the Deck Department found out you were having sexual intercourse with one of their peers, what do you think they would think?

ACC: It would bring disorder—I’m sorry. It would be somewhat disgraceful to our command.¹³⁶

The court held these statements failed to demonstrate that his adultery was prejudicial to good order and discipline or service-discrediting.¹³⁷ Other recent cases exist in which appellate courts have similarly overturned convictions, finding a lack

¹²⁸ See MCM, *supra* note 34, pt. IV, ¶ 60c(2).

¹²⁹ *United States v. Jonsson*, 67 M.J. 624, 626 (C.G. Ct. Crim. App. 2009) (citing Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice (Oct. 1, 2002 to Sept. 30, 2002), *reprinted in* 59 M.J. LXXIII (2004)).

¹³⁰ See *id.* at 626.

¹³¹ Annuschat, *supra* note 124, at 1178.

¹³² *United States v. Freeberg*, No. NMCCA 201400172, 2014 CCA LEXIS 715, *4 (N-M. Ct. Crim. App. Sept. 30, 2014).

¹³³ *Id.*

¹³⁴ *Id.* at *9.

¹³⁵ *United States v. Jonsson*, 67 M.J. 624, 628 (C.G. Ct. Crim. App. 2009).

¹³⁶ *Id.* at 627.

¹³⁷ *Id.*

of a connection between the adulterous act and prejudice to good order and discipline.¹³⁸ Despite the efforts to specifically lay out factors demonstrating whether adultery prejudices good order and discipline, the issue remains subjective, “a strong criticism for continuing to allow the prohibition in its current form.”¹³⁹ Similar restrictions and questions surround Article 134 prosecutions for fraternization.¹⁴⁰

Appellate scrutiny of offenses charged as prejudicial to good order and discipline extend beyond guilty pleas. The services’ courts of criminal appeals have unique fact-finding authority to determine for themselves whether an appellant’s guilt was proven beyond a reasonable doubt, a power normally called “factual sufficiency.”¹⁴¹ While the service appellate courts rarely exercise their fact-finding authority to find convictions factually insufficient,¹⁴² they have at least intermittently done so in recent cases where they have found the government failed to prove Article 134 convictions met the prejudicial to good order and discipline element.¹⁴³ In 2003, for example, the Army court overturned a conviction of an unmanned aerial vehicle instructor for

¹³⁸ United States v. Harrod, No. ARMY 20120731, 2014 CCA LEXIS 325, at *4 (A. Ct. Crim. App. May 22, 2014) (modifying appellant’s adultery conviction, finding the appellant provided a factual basis to support that his adulterous conduct was service-discrediting, but not prejudicial to good order and discipline); United States v. Tadlock, No. ARMY 20110366, 2013 CCA LEXIS 74, at *4 (A. Ct. Crim. App. Jan. 25, 2013) (holding that the appellant’s plea was “based on speculative prejudice or discredit that falls short of the prejudice or discredit required to constitute criminal adultery under Article 134, UCMJ”).

¹³⁹ Christopher Scott Maravilla, *The Other Don’t Ask, Don’t Tell: Adultery Under the Uniform Code of Military Justice After Lawrence v. Texas*, 37 CAP. U. L. REV. 659, 665 (2009).

¹⁴⁰ See MCM, *supra* note 34, pt. IV, ¶ 83(c) (setting forth factors to consider in determining whether contact or association between officers and enlisted persons constitutes an offense under Article 134); United States v. Johanns, 20 M.J. 155, 160 (C.M.A. 1985) (upholding service court’s dismissal of fraternization specifications after finding that the appellant was not on notice that his sexual involvement with enlisted women was prohibited). Currently, the services have regulations prohibiting fraternization, and such conduct is normally handled as a violation of these regulations rather than as an Article 134 offense. Ronald D. Vogt, *Trial Defense Service Notes: Fraternization After Clarke*, ARMY LAW. 45, 46–47 (May 1989).

¹⁴¹ UCMJ art. 66(c) (codified at 10 U.S.C. § 866(c) (2016)); United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

¹⁴² See United States v. Rivera, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. Feb. 18, 2016) (“Most cases reviewed by this court are deemed factually sufficient”); United States v. Mason, No. ACM 31015, 1996 CCA LEXIS 71, at *8–9 (A.F.C.M.R. Feb. 27, 1996) (Dixon, C.J., concurring) (“It is somewhat rare for this Court to set aside a conviction based upon factual insufficiency In the great majority of the cases we review, the record of trial readily establishes the appellant’s guilt beyond a reasonable doubt.”).

¹⁴³ United States v. Davis, No. ARMY 20100375, 2012 CCA LEXIS 184, at *4 (A. Ct. Crim. App. May 23, 2012) (overturning adultery conviction, finding the appellant’s conduct was not prejudicial to good order and discipline or service discrediting); United States v. Bristol, No. ACM 36956, 2009 CCA LEXIS 216, at *12–13 (A.F. Ct. Crim. App. June 11, 2009) (overturning adultery conviction, finding the appellant took steps to keep the adulterous relationship circumspect, and the other person had no relationship to the appellant’s military installation); United States v. Perez, 33 M.J. 1050, 1054 (A.C.M.R. 1991) (finding evidence legally insufficient to demonstrate appellant’s actions in having consensual sexual intercourse after testing positive for HIV were prejudicial to good order and discipline or service-discrediting).

engaging in an unprofessional relationship with students, finding “no convincing evidence” that his conduct was prejudicial to good order and discipline.¹⁴⁴

More notably, in at least two cases, appellate courts that did not possess fact-finding authority nonetheless overturned Article 134 convictions, finding that the government did not even present enough evidence of the prejudicial to good order and discipline element for a reasonable factfinder to have convicted the accused. The Army Court of Criminal Appeals upheld an Article 134 conviction in *United States v. Wilcox* for making anti-government and disloyal statements as well as statements that promoted racial intolerance on the Internet.¹⁴⁵ The case then proceeded to CAAF, which reviewed the conviction under a pure legal sufficiency standard: whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.¹⁴⁶ Even under this deferential standard, CAAF overturned the conviction, finding that the appellant’s speech was neither prejudicial to good order and discipline nor service-discrediting because the government failed to introduce any evidence to meet this element.¹⁴⁷ Similarly, in *United States v. Warnock*, the Army court lacked fact-finding authority because the case was forwarded to it for review by the Judge Advocate General rather than through the normal direct appeal process.¹⁴⁸ The court held that under a legal sufficiency standard, no credible evidence demonstrated that the appellant’s act of photographing a female officer in the nude and showing the negatives to a junior enlisted soldier did anything to prejudice good order and discipline:

While the appellant’s conduct was certainly reprehensible and below the standards expected of a noncommissioned officer, Article 134 is not a “catchall as to make every irregular, mischievous, or improper act a court-martial offense.” The requirement for “direct and palpable” prejudice to good order and discipline means that the conduct “must be easily recognizable as criminal, must have a direct and immediate adverse impact on discipline, and must be judged in the context surrounding the acts.” As Judge Kilday recognized long ago, “While *some* discredited no doubt attaches to any act or omission falling short of the optimum norm, it is settled that not every such incident is of the dishonorable, deceitful, and compromising nature recognized under . . . Article 134 of the Code.” A breach of the principles of leadership, standing alone, “generally is only a lack of good judgment—not a crime.”¹⁴⁹

¹⁴⁴ *United States v. Creighton*, No. ARMY 20010208, 2003 CCA LEXIS 335, at *5–6 (A. Ct. Crim. App. Jan. 22, 2003).

¹⁴⁵ *United States v. Wilcox*, No. ARMY 20000876, 2006 CCA LEXIS 439, at *18–19 (A. Ct. Crim. App. Dec. 22, 2006).

¹⁴⁶ *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (citing *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)).

¹⁴⁷ *Id.* at 451.

¹⁴⁸ *United States v. Warnock*, 34 M.J. 567, 569 (A.C.M.R. 1991); *see also* UCMJ art. 69(d)(1) (codified at 10 U.S.C. § 869(d)(1) (2017)) (providing for appellate review of cases by order of the Judge Advocate General).

¹⁴⁹ *Warnock*, 34 M.J. at 569–70 (citations omitted).

Of course, appellate decisions such as these only arise after the government has succeeded in obtaining a conviction at trial by persuading the factfinder that the accused's actions prejudiced good order and discipline. Clearing this hurdle can prove particularly difficult when it comes to the terminal element of prejudice to good order and discipline. In fact, how the government is supposed to introduce evidence to meet this terminal element in a litigated case is not entirely clear. At least one appellate decision has held that the the accused's commander may not provide lay opinion testimony as to whether actions prejudiced good order and discipline.¹⁵⁰ If the government cannot introduce this evidence, the factfinder must make its determination based on the particular situation.

As the forerunner to CAAF noted in an early case:

Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particulars to determine in advance which acts are prejudicial to good order and discipline and which are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many ways.¹⁵¹

Many acts charged under Article 134 may be perfectly lawful and appropriate depending on the context in which they occurred, requiring that "the factfinder must be certain that the prejudice or the discrediting nature of the conduct is legitimately focused toward good order and discipline or discrediting to the armed forces, and is not solely the result of personal fears, phobias, biases, or prejudices of the witnesses."¹⁵² How exactly the government is supposed to lead the factfinder to this determination remains uncertain even after nearly seventy years of the UCMJ.

Compounding the problem is that the *Manual for Courts-Martial* contains no real definition of good order and discipline. The definition of "conduct prejudicial to good order and discipline" in the *Manual* reads as follows:

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of the member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces.

. . . .

A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by

¹⁵⁰ See *United States v. Littlewood*, 53 M.J. 349, 352–54 (C.A.A.F. 2000) (holding the military judge erred in allowing the appellant's commander, over defense objection, to personally characterize the nature and effect of many of the appellant's acts).

¹⁵¹ *United States v. Free*, 14 C.M.R. 466, 470 (C.M.A. 1953).

¹⁵² *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991) (upholding appellant's Article 134 convictions for cross-dressing).

common usage have attained the force of law in the military or other community affected by them¹⁵³

This guidance provides no indication as to what good order and discipline is. Instead, the guidance merely outlines the degree of prejudice necessary for UCMJ action and provides one broad manner in which an act may prejudice good order and discipline.¹⁵⁴ Likewise, the *Military Judges' Benchbook*, which expands upon the *Manual's* definitions for hundreds of terms, offers no such assistance for conduct prejudicial to good order and discipline.¹⁵⁵ The *Benchbook* merely apes the *Manual's* requirement that such conduct causes “reasonably direct and obvious injury to good order and discipline.”¹⁵⁶ Under these circumstances, individual judges or court members must decide for themselves whether specific acts prejudiced good order and discipline based on their individual, unstated, fact-specific criteria.¹⁵⁷ This position is not an enviable one for the prosecutor.¹⁵⁸

Occasionally, decisions in this area indicate that a certain classification of actions may be inherently prejudicial to good order and discipline and thus do not require evidence or specific admission to prove this element. In *United States v. Smith*, for example, the Navy-Marine Corps Court held that a superior's courtship of an enlisted subordinate that resulted in adultery, all of which occurred on a military installation and frequently in the presence of other unit members, “was unequivocally to the prejudice of good order and discipline.”¹⁵⁹ A later appellate decision interpreted *Smith* to mean that some categories of acts are prejudicial to good order and discipline or service discrediting “on their face.”¹⁶⁰ Likewise, the forerunner to CAAF held in 1988 that cross-dressing on a military installation was conduct which “on its face, appellant should have recognized as having an adverse effect on good order and discipline and as being service-discrediting.”¹⁶¹ The Army court has occasionally stated that offenses involving moral turpitude are inherently prejudicial or discrediting.¹⁶² However, the parameters and continuing viability of an “inherently prejudicial” doctrine are not at all clear, and CAAF has declined to weigh in as to whether some acts are inherently prejudicial to good order and discipline.¹⁶³ The lack of clarity leaves prosecutors,

¹⁵³ See MCM, *supra* note 34, pt. IV, ¶ 60(c)(2)(a)–(b).

¹⁵⁴ *Id.*

¹⁵⁵ See generally U.S. DEP'T OF ARMY, PAM. 27–9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 3-60-2a(d) (2014).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., *United States v. Wilcox*, 66 M.J. 442, 451–52 (C.A.A.F. 2008).

¹⁵⁹ *United States v. Smith*, 18 M.J. 786, 789–90 (N-M.C.M.R. 1984).

¹⁶⁰ *United States v. Thatch*, 30 M.J. 623, 625 (N-M.C.M.R. 1990).

¹⁶¹ *United States v. Davis*, 26 M.J. 445, 446 n.1 (C.M.A. 1988).

¹⁶² *United States v. Johnson*, 39 M.J. 1033, 1038 (A.C.M.R. 1994); *United States v. Poole*, 39 M.J. 819, 821 (A.C.M.R. 1994).

¹⁶³ *United States v. Brisbane*, 63 M.J. 106, 117 n.11 (C.A.A.F. 2006) (“Because we conclude that the record contains specific evidence that Appellant's conduct was service-discrediting and/or prejudicial to good order and discipline, we need not consider how, if at all, *Free Speech*

judges, court members, appellate courts, and servicemembers generally to guess at what is and is not prejudicial to good order and discipline.¹⁶⁴

B. CAAF and the Scale Back of Article 134

For much of the UCMJ's history, any "enumerated" offense—those specifically-listed crimes in the UCMJ such as murder, rape, drug use, and larceny—was believed to automatically carry an element of prejudice to good order and discipline or a service-discrediting nature.¹⁶⁵ The highest military court repeated in a series of cases that every offense listed in the UCMJ was "per se" prejudicial to good order and discipline.¹⁶⁶ In *United States v. Foster*, the accused was charged and convicted with indecent assault and forcible sodomy.¹⁶⁷ The intermediate service court set aside the conviction for forcible sodomy, but substituted a finding of guilty to committing an indecent act for the original charge.¹⁶⁸ Upon appeal to the higher court, the appellant alleged that indecent acts is not a lesser-included offense of forcible sodomy, alleging that indecent acts (an Article 134 offense) required proof of the terminal element that forcible sodomy did not, and thus indecent acts were not "necessarily included" in the charged offense.¹⁶⁹

The court rejected the appellant's argument. It recognized that under the "plain meaning" of Article 134, a general article offense could not be a lesser-included offense of an enumerated offense because of the need to prove the terminal element under Article 134.¹⁷⁰ However, the court rejected such a plain meaning view, holding that such a position would cause "incongruous results."¹⁷¹ Instead, the court distinguished between the enumerated articles and Article 134 offenses, holding: "The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles. Although the Government is not required to prove these elements in an enumerated-article prosecution, they are certainly present."¹⁷² Several decisions following *Foster* repeated similar propositions asserting an expansive role for the Article 134 terminal element in military law.¹⁷³

Coalition applies to the Government's argument that Appellant's conduct, as an act of moral turpitude, was inherently prejudicial or service-discrediting.").

¹⁶⁴ See MCM, *supra* note 34, pt. IV, ¶ 60(b)(1).

¹⁶⁵ *United States v. Miller*, 67 M.J. 385, 388–89 (C.A.A.F. 2009).

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Foster*, 40 M.J. 140, 141–42 (C.M.A. 1994).

¹⁶⁸ *Id.* at 141 n.1.

¹⁶⁹ *Id.* at 142.

¹⁷⁰ *Id.* at 143.

¹⁷¹ *Id.*

¹⁷² *Id.* The court also cited an earlier case in stating that "it is merely a matter of historical accident that some offenses came to be assigned separate articles without that element, while others continue to be charged with the element under the general article." *Id.* (quoting *United States v. Doss*, 15 M.J. 409, 415 (C.M.A. 1983) (Cook, J., concurring in the judgment)).

¹⁷³ *United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000) ("[E]very enumerated offense under the UCMJ is *per se* prejudicial to good order and discipline or service-discrediting.");

However, in a series of cases beginning in 2009, CAAF reversed course, limiting the reach of Article 134 and its terminal element. First, in *United States v. Medina*, the court reviewed a soldier's conviction for possessing and transporting child pornography and coercing a minor into producing child pornography.¹⁷⁴ The appellant pled guilty to and was convicted of these offenses as violations of UCMJ Article 134, but not as acts prejudicial to good order and discipline or service-discrediting.¹⁷⁵ Instead, the government charged the appellant with offenses under clause 3 of Article 134, "crimes and offenses not capital," because they allegedly violated the Child Pornography Prevention Act (CPPA).¹⁷⁶

The Army Court of Criminal Appeals found that the offenses did not violate the CPPA because that act did not apply outside the United States, but nonetheless affirmed the conviction because it found that the appellant's actions were service-discrediting.¹⁷⁷ CAAF reversed the Army court, finding that a clause 1 or clause 2 violation of Article 134 is not a lesser-included offense of a clause 3 violation because clause 1 and clause 2 violations contain an element that a clause 3 violation does not (namely, that the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces).¹⁷⁸ Thus, even though the court agreed that "the viewing of child pornography discredits those who do it, as well as the institutions with which those persons are identified," the court held that because the appellant was not advised of the service-discrediting element, his guilty plea was not knowing.¹⁷⁹

The importance of *Medina* to Article 134 became clearer a year later. In *United States v. Miller*, the court held that a simple disorder under Article 134 was not a lesser-included offense of resisting apprehension (an enumerated offense rather than an Article 134 offense as in *Medina*).¹⁸⁰ The *Miller* court specifically overruled its earlier precedent holding that every enumerated offense is inherently prejudicial to good order and discipline or service discrediting.¹⁸¹ The court extended this holding a year later in *United States v. Jones*, holding that "indecent acts" under Article 134 was not a lesser-included offense of rape because indecent acts added an element not included in rape.¹⁸² The *Jones* decision required a complete re-examination of all

United States v. Sapp, 53 M.J. 90, 92 n.2 (C.A.A.F. 2000) ("[T]he elements of prejudice to good order and discipline and discredit to the armed forces are implicit in every enumerated offense . . ."); United States v. Britton, 47 M.J. 195, 198 (C.A.A.F. 1997) ("[A]n offense under Article 134 can be a lesser-included offense of an offense under an enumerated Article, notwithstanding the requirement under Article 134 to prove that the conduct was prejudicial or service-discrediting.").

¹⁷⁴ United States v. Medina, 66 M.J. 21, 22 (C.A.A.F. 2008).

¹⁷⁵ *Id.* at 24.

¹⁷⁶ 10 U.S.C. § 934 (2016); *Medina*, 66 M.J. at 22.

¹⁷⁷ *Medina*, 66 M.J. at 24; United States v. Medina, No. ARMY 20040327, 2006 CCA LEXIS 407, at *9–10 (A. Ct. Crim. App. Aug. 31, 2006).

¹⁷⁸ *Medina*, 66 M.J. at 26.

¹⁷⁹ *Id.* at 27.

¹⁸⁰ United States v. Miller, 67 M.J. 385, 388 (C.A.A.F. 2009).

¹⁸¹ *Id.* at 389.

¹⁸² United States v. Jones, 68 M.J. 465, 473 (C.A.A.F. 2010).

lesser-included offenses within the military justice system by holding that offenses listed in the *Manual for Courts-Martial* as lesser-included offenses could not be relied upon, particularly with regard to Article 134 offenses.¹⁸³ *Jones* thus represented a “fundamental shift” in both the law of lesser-included offenses and Article 134’s reach.¹⁸⁴ It was, in the words of a popular military justice blog, “a big freakin’ deal.”¹⁸⁵

Taken together, the *Medina*, *Miller*, and *Jones* decisions are significant for their impact on lesser-included offenses, but more importantly because they represent a “narrowing [of] the reach of Article 134’s terminal element,” including the good order and discipline clause.¹⁸⁶ In these three decisions, CAAF signaled a distaste for the broad scope of the good order and discipline and service-discrediting provisions. This point soon became clear in *United States v. Fosler*.¹⁸⁷ *Fosler* represented the next evolution of the *Medina-Miller-Jones* rationale; whereas those cases examined whether Article 134 offenses were distinct from other offenses because of the terminal element, *Fosler* examined whether the government needed to expressly allege the terminal element on the charge sheet in order to properly place the accused on notice of the charge(s) against him or her.¹⁸⁸ The court convicted Lance Corporal Fosler of adultery over his plea of not guilty.¹⁸⁹ In accordance with long-standing military justice practice, the *Manual for Courts-Martial*’s model charging language at the time, and decades of precedent by the military high court, the government did not specifically allege that the accused’s actions were prejudicial to good order and discipline and/or service-discrediting.¹⁹⁰ CAAF, however, extended *Medina*, *Miller*, and *Jones*, noting that these decisions demonstrate that “the historical practice of implying Article 134’s terminal element in every enumerated offense was no longer permissible,” and thus the cases “call into question the practice of omitting the terminal element from the charge and specification.”¹⁹¹ Noting that the three components of Article 134’s terminal element are distinct and separate, the court held that the terminal element language must be included in the charging language if it is not necessarily implied.¹⁹²

¹⁸³ *Id.* at 473.

¹⁸⁴ Patrick D. Pflaum, *Lesser Included Offenses Update: United States v. Jones*, ARMY LAW. 27, 27 (July 2010).

¹⁸⁵ Mike Navarre, *Top 10 Military Justice Stories of 2010—#4: The New LIO Jurisprudence*, CAAFLOG (Dec. 31, 2010), <http://www.caaflog.com/2010/12/31/top-10-military-justice-stories-of-2010%e2%80%934-the-new-lio-jurisprudence/?hilit=jones#comments>.

¹⁸⁶ Weber, *supra* note 72, at 150.

¹⁸⁷ *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 226.

¹⁹⁰ *Id.* at 227–28; *see also* MCM, *supra* note 34, pt. IV, ¶ 60(c)(6)(a) (2008 ed.) (“A specification alleging a violation of Article 134 need not expressly allege that the conduct was ‘a disorder or neglect,’ that it was ‘of a nature to bring discredit upon the armed forces,’ or that it constituted ‘a crime or offense not capital.’”).

¹⁹¹ *Fosler*, 70 M.J. at 228.

¹⁹² *Id.* at 230, 233.

In the wake of the “revolutionary” *Fosler* decision,¹⁹³ how far the decision would extend was not clear. *Fosler* involved a litigated charge and a defense objection to the charging language;¹⁹⁴ it did not answer the question of what would become of all pending appellate cases in which the appellant had not objected to the charging language or had even pled guilty.¹⁹⁵ The answer soon followed in *United States v. Humphries*.¹⁹⁶ In that case, the court overturned an adultery conviction under Article 134 where the terminal element language was not listed, holding that even though the appellant did not object at trial, the omission constituted plain error that prejudiced a substantial right of the appellant.¹⁹⁷ Thus, the court held, unless “notice of the missing element is somewhere extant in the trial record, or . . . is ‘essentially uncontroverted,’” the failure to allege the terminal element language remains grounds for reversal even if the accused did not object.¹⁹⁸

While CAAF later held that the failure to allege the terminal element language was not grounds for reversal in the case of a guilty plea,¹⁹⁹ the combined impact of *Fosler* and *Humphries* was momentous. No fewer than 107 cases saw at least one specification set aside based on CAAF’s new requirement for charging language.²⁰⁰ The specifications set aside include such serious offenses as negligent homicide,²⁰¹ indecent acts with a child,²⁰² willful discharge of a firearm,²⁰³ and communicating a

¹⁹³ Mark Kulish, *A View from the Bench: Charging in Courts-Martial*, ARMY LAW. 35, 35 (Sept. 2012).

¹⁹⁴ *Fosler*, 70 M.J. at 226–27.

¹⁹⁵ *See id.*

¹⁹⁶ *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

¹⁹⁷ *Id.* at 214–15.

¹⁹⁸ *Id.* at 215–16 (quoting in part *United States v. Cotton*, 535 U.S. 625, 633 (2002)); *see United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

¹⁹⁹ *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

²⁰⁰ The author calculated this number by reviewing all 269 military justice cases that cited to *Humphries* and annotating the decisions in which either a service court of criminal appeals or CAAF set aside one or more specifications because of failure to comply with the *Fosler* and *Humphries* requirement. The author notes that he served as a judge on the Air Force Court of Criminal Appeals from 2013 to 2015 and acted upon some of these 107 cases.

²⁰¹ *United States v. Lindgren*, No. ACM 37928, 2013 CCA LEXIS 330 (A.F. Ct. Crim. App. Apr. 16, 2013); *United States v. Books*, No. ACM 37938, 2013 CCA LEXIS 78 (A.F. Ct. Crim. App. Feb. 5, 2013).

²⁰² *See, e.g., United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013); *United States v. Valentin*, 72 M.J. 450 (C.A.A.F. 2013) (summary disposition); *United States v. Verdejo-Ruiz*, No. ACM 37957 (recon), 2014 CCA LEXIS 607 (A.F. Ct. Crim. App. Aug. 14, 2014); *United States v. Bell*, 72 M.J. 543 (A. Ct. Crim. App. 2013); *United States v. Carter*, No. ACM 37715, 2013 CCA LEXIS 1 (A.F. Ct. Crim. App. Jan. 4, 2013); *United States v. Swift*, No. ARMY 20100196, 2012 CCA LEXIS 459 (A. Ct. Crim. App. Nov. 29, 2012); *United States v. Bozeman*, No. ARMY 20080711, 2012 CCA LEXIS 369 (A. Ct. Crim. App. Sept. 28, 2012).

²⁰³ *United States v. Wall*, No. ACM 37842, 2013 CCA LEXIS 418 (A.F. Ct. Crim. App. May 17, 2013).

threat.²⁰⁴ In six cases, the appellant had been convicted only of Article 134 offenses, meaning their convictions were dismissed in their entirety.²⁰⁵

The *Fosler* and *Humphries* decisions, coming on the heels of *Medina*, *Miller*, and *Jones*, demonstrated that CAAF “has . . . begun to cast a more skeptical eye towards the general articles of the UCMJ.”²⁰⁶ The decisions may not have overturned the general articles themselves, but they certainly impacted a number of Article 134 convictions.²⁰⁷ The decisions “represent indications that the courts may be becoming less deferential towards the military over time, particularly when basic civil liberties claims are implicated and particularly with regard to the kinds of matters addressed by the general articles.”²⁰⁸ Even in the wake of these decisions, exactly how conduct under the general article should be charged remains uncertain.²⁰⁹ The decisions did not put an end to Article 134 generally or the good order and discipline clause specifically, but they do indicate a judicial tightening of the situations in which conduct prejudicial to good order and discipline or service-discrediting may be charged.²¹⁰ What the future holds for the terminal element, including the good order and discipline clause, remains unclear.²¹¹

²⁰⁴ Eleven cases saw at least one specification of communicating a threat set aside. *See, e.g.*, *United States v. McIntosh*, No. ACM 37977, 2014 CCA LEXIS 29 (A.F. Ct. Crim. App. Jan. 17, 2014) (communicating a threat and assault with intent to commit rape); *United States v. Bevers*, No. ARMY 20100950, 2012 CCA LEXIS 481 (A. Ct. Crim. App. Nov. 29, 2012) (three specifications of communicating a threat); *United States v. Dietz*, No. ARMY 20081031, 2012 CCA LEXIS 359 (A. Ct. Crim. App. Sept. 13, 2012) (communicating a threat and indecent act upon a child).

²⁰⁵ *United States v. Swartz*, 72 M.J. 465 (C.A.A.F. 2013) (summary disposition) (solicitation to commit premeditated murder); *United States v. Hudson*, 72 M.J. 464 (C.A.A.F. 2013) (indecent acts with a child); *United States v. Rodriguez*, No. ACM 37878, 2013 CCA LEXIS 672 (A.F. Ct. Crim. App. July 11, 2013) (child endangerment); *United States v. Thompson*, No. ARMY 20100545, 2013 CCA LEXIS 470 (A. Ct. Crim. App. May 30, 2013); *United States v. McIntyre*, No. ACM S31782, 2012 CCA LEXIS 468 (A.F. Ct. Crim. App. Nov. 30, 2012) (six specifications of stealing matters from the mail); *United States v. Justice*, No. ACM 37446 (f rev), 2012 CCA LEXIS 356 (A.F. Ct. Crim. App. Sept. 13, 2012).

²⁰⁶ Jason Steck, *Dissent Without Disloyalty: Expanding the Free Speech Rights of Military Members Under the “General Articles” of the UCMJ*, 96 MINN. L. REV. 1606, 1626 (2012).

²⁰⁷ *See United States v. Dietz*, No. ACM 38117 (rem), 2014 CCA LEXIS 401 (A.F. Ct. Crim. App. July 17, 2014); *United States v. Miles*, 71 M.J. 671 (N-M. Ct. Crim. App. 2012).

²⁰⁸ Steck, *supra* note 206, at 1626–27.

²⁰⁹ For example, one issue is whether it is appropriate to charge an act as being either prejudicial to good order and discipline *or* service-discrediting (i.e., charging in the disjunctive). Several decisions have indicated potential problems with charging conduct under Article 134 in the disjunctive. *See, e.g., Dietz*, No. ACM 38117 at *5–6; *Miles*, 71 M.J. at 673.

²¹⁰ *See, e.g., United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

²¹¹ Military appellate courts also have refused to expand Article 134 in one way following this line of cases. The preemption doctrine prohibits the government from charging a servicemember under Article 134 for conduct already covered by an enumerated article. Under this doctrine, conduct is considered to be already covered by an enumerated article if: (1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ, and (2) The offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ. *United States v. Wright*, 5 M.J. 106, 110–

C. Congressional Contraction of Article 134—The Military Justice Act of 2016

The Fiscal Year 2017 National Defense Authorization Act (“NDAA”) contains the most significant and comprehensive revision of military justice in decades, if not in the history of the modern UCMJ.²¹² The law includes the “Military Justice Act of 2016,” a series of reforms proposed by the Military Justice Review Group.²¹³ Such reforms include standardizing the number of members detailed to a court-martial,²¹⁴ authorizing military judges or military magistrates to handle certain issues before charges are referred,²¹⁵ and overhauling sentencing procedures.²¹⁶

The NDAA also significantly limits the scope of UCMJ Article 134 beyond what the courts have done in recent years. It removes thirty-four offenses currently contained under Article 134 and creates new enumerated offenses under the UCMJ for acts including several military-specific offenses. These military-specific offenses include misconduct by a sentinel or lookout;²¹⁷ false or unauthorized pass;²¹⁸

11 (C.M.A. 1978). In light of the *Medina-Miller-Jones-Fosler-Humphries* line of cases, there was some indication that the preemption doctrine no longer should limit the government’s charging options under Article 134, as the emphasis in these decisions on the distinctiveness of the Article 134 terminal element indicated that Article 134 could never be composed of a residuum of the elements of an enumerated offense. *United States v. Jones*, 68 M.J. 465, 474 n.2 (C.A.A.F. 2010) (Baker, J., dissenting) (“[T]he majority has also eliminated the issue of multiplicity and claims of preemption for clauses 1 and 2 of Article 134, UCMJ . . .”). However, appellate courts have thus far continued to apply the preemption doctrine to bar the government from charging certain conduct under Article 134. *See, e.g.*, *United States v. Costianes*, No. ACM 38868, 2016 CCA LEXIS 391 (A.F. Ct. Crim. App. June 30, 2016); *United States v. Rodriguez*, No. ARMY 20130577, 2016 CCA LEXIS 145 (A. Ct. Crim. App. Mar. 7, 2016); *United States v. Long*, No. 2014–02, 2014 CCA LEXIS 386 (A.F. Ct. Crim. App. July 2, 2014).

²¹² R. Peter Masterton, *Military Justice Review Group*, FED. B. ASSOC. VETERANS & MIL. L. SEC. NEWSL. 4, 4 (Spring 2016) (“The recommendations . . . constitute the most comprehensive revision of military criminal law since 1983.”); John McCain, Armed Services Chairman, Statement on National Defense Authorization Act Conference Report, in CONGRESSIONAL DOCUMENTS AND PUBLICATIONS, Nov. 30, 2016 (“Taken together, the provisions contained in the conference report constitute the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago.”).

²¹³ The Military Justice Review Group is a collection of legal professionals directed by Department of Defense leadership to conduct a widespread review of the military justice system.

²¹⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 5187, 130 Stat. 2000 (2016).

²¹⁵ *Id.* § 5202.

²¹⁶ *Id.* § 5236 (providing for sentencing by a military judge unless the accused, following a conviction by members, elects sentencing by members); *id.* § 5301 (setting forth sentence minimums for certain offenses, spelling out factors the court-martial shall consider in sentencing an accused, and providing for government appeal of a sentence that violates the law or is “plainly unreasonable”).

²¹⁷ *Id.* § 5411.

²¹⁸ *Id.* § 5416.

impersonating a commissioned, noncommissioned, or petty officer or agent or official;²¹⁹ wearing unauthorized insignia;²²⁰ and incapacitation for duty.²²¹

By removing these thirty-four offenses from Article 134, Congress removed the requirement to prove that the conduct is either prejudicial to good order and discipline or service-discrediting, reasoning that such offenses are “well-recognized concept[s] in criminal law” and thus do “not need to rely upon the ‘terminal element’ of Article 134 . . . as the basis for [their] criminality.”²²² The only offenses left under Article 134 are those for which “there is a military-specific reason for utilizing the terminal element under Article 134.”²²³ By removing these offenses from the general article while not adding any listed offenses to Article 134, the new act will reduce the number of offenses specifically listed under Article 134 from fifty-three to just nineteen.²²⁴ This reduction will not remove the government’s ability to charge actions that do not fall under any listed offense as prejudicial to good order and discipline or service-discrediting, but it will further limit the number of acts charged under Article 134.²²⁵

D. The Impact: The Decline of the “Good Order and Discipline” Clause of Article 134

Article 134 may remain alive, but the courts and Congress have tightened the noose around its neck. The uncertainty regarding how to prove conduct charged as prejudicial to good order and discipline, the issues such cases face on appeal, and the *Medina-Miller-Jones-Fosler-Humphries* line of cases do not prevent the government from charging misconduct under Article 134. However, the difficulties general article cases present—and the general sense that Article 134 has reached too far—might be expected to result in a drop of its usage. In addition, the limitations on punishing adultery and fraternization under Article 134 should contribute to a decrease in the number of cases under the general article.

²¹⁹ *Id.* § 5417.

²²⁰ *Id.* § 5418.

²²¹ *Id.* § 5424.

²²² *Military Justice Act of 2016: Section-by-Section Analysis*, http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf (last visited Feb. 1, 2017).

²²³ Art. 134, General Article (codified at 10 U.S.C.S. § 934 (2017)); see *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

²²⁴ See MCM, *supra* note 34, pt. IV, ¶¶ 61–113 (listing offenses specifically itemized under Article 134).

²²⁵ This reduction in the number of specifically-listed offenses under Article 134 is the most significant such decrease, but it is not the first. The 2006 National Defense Authorization Act removed four listed offenses from Article 134 in the *Manual for Courts-Martial* (indecent assault, indecent acts or liberties with a child, indecent exposure, and indecent acts with another). MCM, *supra* note 34, pt. IV app. 27 (2008 ed.). In addition, in 1990, an executive order deleted the Article 134 offense of “requesting commission of an offense.” Exec. Order No. 12,708, 55 Fed. Reg. 11,353 (Mar. 27, 1990).

To determine whether this has occurred, officials from the Army, Air Force, Navy, and Marine Corps²²⁶ were asked to provide information about court-martial and Article 15²²⁷ rates utilizing the general article. Specifically, this study sought information about the prevalence of charging conduct as prejudicial to good order and discipline under the general article. The services were asked to provide information about courts-martial and Article 15 actions in which at least one specification involving Article 134 was charged, dating back as long as reliable data was available.²²⁸

Three of the services responded. Air Force data revealed the numbers of total courts-martial (general, special, and summary) dating back to 1997 that contained at least one specification under Article 134:²²⁹

| Year | Number of Cases |
|-------------|------------------------|
| 1997 | 340 |
| 1998 | 256 |
| 1999 | 258 |
| 2000 | 269 |
| 2001 | 270 |
| 2002 | 281 |
| 2003 | 267 |
| 2004 | 321 |
| 2005 | 294 |
| 2006 | 237 |
| 2007 | 207 |
| 2008 | 205 |
| 2009 | 234 |
| 2010 | 250 |
| 2011 | 245 |
| 2012 | 192 |
| 2013 | 221 |
| 2014 | 169 |
| 2015 | 131 |
| 2016 | 107 |

The Air Force also provided the number of Article 15 actions since 1997:²³⁰

²²⁶ The Coast Guard was not contacted, as its traditional caseload was determined to be too small to provide meaningful data.

²²⁷ Under this article, commanders may impose non-judicial punishment for minor offenses and impose punishments such as reduction in rank for enlisted members, forfeiture of pay, and extra duties. UCMJ art. 15 (codified at 10 U.S.C. § 815 (2016)).

²²⁸ The author asked representatives from the military services whether such data was available specifically for offenses charged as prejudicial to good order and discipline (clause 1), but such information was not reliably available across the services.

²²⁹ Information obtained with permission from Air Force Automated Military Justice Analysis and Management System (Feb. 15, 2017) (on file with author).

²³⁰ *Id.*

| Year | Number of Article 15 Actions |
|-------------|-------------------------------------|
| 1997 | 2122 |
| 1998 | 1717 |
| 1999 | 1720 |
| 2000 | 1810 |
| 2001 | 1818 |
| 2002 | 1754 |
| 2003 | 1819 |
| 2004 | 2048 |
| 2005 | 1658 |
| 2006 | 1531 |
| 2007 | 1360 |
| 2008 | 1298 |
| 2009 | 1274 |
| 2010 | 1201 |
| 2011 | 1260 |
| 2012 | 1296 |
| 2013 | 1249 |
| 2014 | 944 |
| 2015 | 737 |
| 2016 | 666 |

The Marine Corps was not able to provide information in response to the request, and neither the Army nor the Navy tracks Article 15 actions in a central database. The Army provided information about the number of general and special courts-martial (not summary courts-martial) that contained at least one specification under Article 134 dating back to 1989.²³¹

| Year | Number of Cases |
|-------------|------------------------|
| 1989 | 1077 |
| 1990 | 1005 |
| 1991 | 844 |
| 1992 | 806 |
| 1993 | 654 |
| 1994 | 657 |
| 1995 | 649 |
| 1996 | 607 |
| 1997 | 584 |
| 1998 | 548 |
| 1999 | 544 |
| 2000 | 469 |
| 2001 | 535 |
| 2002 | 613 |

²³¹ E-mail from Army Court of Criminal Appeals to author (Feb. 14, 2017) (on file with author) (compiling statistics for Article 134 courts-martial by year, upon request).

| Year | Number of Cases |
|------|-----------------|
| 2003 | 541 |
| 2004 | 526 |
| 2005 | 639 |
| 2006 | 562 |
| 2007 | 585 |
| 2008 | 395 |
| 2009 | 374 |
| 2010 | 399 |
| 2011 | 446 |
| 2012 | 464 |
| 2013 | 441 |
| 2014 | 395 |
| 2015 | 326 |
| 2016 | 299 |

The Navy, meanwhile, only possessed statistics dating back three years for general and special courts-martial (not summary courts-martial) involving at least one specification of any clause of Article 134.²³²

| Year | Number of Cases |
|------|-----------------|
| 2014 | 93 |
| 2015 | 78 |
| 2016 | 83 |

The disparate and limited data available precludes many conclusions about whether Article 134 as a whole is being employed in a more limited manner in recent years. The data also sheds little insight into the specific issue of whether commanders are employing the prejudicial to good order and discipline clause less often in Article 15 actions. However, two points from this data bear discussion.

First, the number of disciplinary actions utilizing Article 134 appears to have dropped markedly for the Army and the Air Force (and, to the extent the small sample size allows, the Navy). The Air Force saw a drop in Article 134 courts-martial from 340 to 107 over twenty years and a drop in Article 15 actions from 2122 to 666 in that same time. Likewise, the Army's number of Article 134 courts-martial dropped from more than 2800 to fewer than 800 since 1989. The Navy's limited data also trends downward for Article 134 courts-martial. In interpreting the significance of these numbers, it is important to note that the overall number of courts-martial and Article 15 actions have also trended downward during this period. The services provide an annual report by fiscal year showing their total number of courts-martial and Article 15 actions, among other information.²³³ For the Air Force, total number of courts-martial decreased from 1002 to 524 from fiscal years 1997 to 2015.²³⁴ Further, the total

²³² E-mail from Navy Criminal Law Division to author (Feb. 10, 2017) (on file with author) (compiling statistics for Article 134 courts-martial by year, upon request).

²³³ U.S. Court of Appeals for the Armed Forces, ANNUAL REPORTS, http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm (last visited Sept. 10, 2017).

²³⁴ *Id.* (annual reports for fiscal years 1997 and 2016).

of Air Force Article 15 actions fell by almost half, from 8481 to 4516 during this time.²³⁵ In the Army, while Article 134 general and special courts-martial fell from 1077 in 1989 to 299 in 2016, total general and special courts-martial likewise dropped from 2619 to 862 during this period.²³⁶ Still, even accounting for total decreases in courts-martial and Article 15 actions, Article 134 cases have fallen at a substantially faster rate than overall actions across the board, with particularly notable decreases coming in recent years.

Second, the data also makes apparent that the Army utilizes Article 134 in courts-martial somewhat more frequently than the other services.²³⁷ The Army has utilized Article 134 in roughly thirty-five to forty percent of its general and special courts-martial most years since 1989.²³⁸ The Navy, by contrast, has utilized clause 1 of Article 134 in about thirty percent of general and special courts-martial.²³⁹ The percentage of Air Force courts-martial that involved Article 134 offenses generally ranged between twenty-five and thirty-three percent.²⁴⁰

Despite the difficulties with its definition and employment, most notably reflected in recent appellate decisions, Article 134 (including the prejudicial to good order and discipline clause) remains in use. However, the number of Article 134 courts-martial and non-judicial punishment actions has fallen at a higher rate than overall disciplinary actions, and they can be expected to shrink significantly more as the elimination of many of the listed Article 134 offenses from the most recent NDAA take effect.²⁴¹

III. THE DISORDERLY AND UNDISCIPLINED USE OF “GOOD ORDER AND DISCIPLINE”—REASONS FOR THE FALL OF THE GENERAL ARTICLE²⁴²

Why has Article 134 in general—and the prejudicial to good order and discipline element in particular—come under increased scrutiny in recent years? This Article proposes three interrelated reasons for this development: (1) the lack of an agreed-upon definition for good order and discipline; (2) the changing nature of society, the military mission, and military demographics; and (3) overuse of the term, leading to widespread cynicism about the good order and discipline justification. Additionally, the increasing civilianization of military justice has further divorced the military from its understanding of good order and discipline, compounding the situation.

²³⁵ *Id.*

²³⁶ *Id.* (annual reports for fiscal years 1989 and 2016).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 5187, 130 Stat. 2000 (2016).

²⁴² Much of the material in this section is adapted from a research paper the author completed as part of the in-residence curriculum for Air War College. The paper is pending publication by Air University Press as part of its “Maxwell Papers” series. It can be found at www.dtic.mil/doctrine/education/jpme_papers/weber_j.pdf.

A. The Lack of a Definition

To be enforceable, the two primary clauses of Article 134's terminal element need to be understood. The second clause, "of a nature to bring discredit upon the armed forces," is fairly intuitive; if conduct tends to cast the military in a negative light, it violates Article 134.²⁴³ The *Manual for Courts-Martial* supplements this common-sense understanding with a relatively clear, comprehensive definition for this element: "'Discredit' means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."²⁴⁴ Appellate decisions have not wrestled with problems proving this element in the way that they have for conduct prejudicial to good order and discipline.²⁴⁵

"Good order and discipline," however, represents something more elusive. "Discredit" is a word that civilians understand; a worker at Apple or General Motors understands what it means to bring discredit upon his or her employer. "Good order and discipline," however, is a more uniquely military term. Military leaders throughout history agree that maintaining good order and discipline is centrally important to military effectiveness. However, the understanding about the importance of maintaining good order and discipline has not translated into meaningful dialogue as to what exactly good order and discipline *is*.

As noted above, neither the *Manual* nor the *Military Judges' Benchbook* contains a substantive, meaningful definition of the term.²⁴⁶ Case law has not filled in the gap; several detailed searches located no case that expands upon the bare-bones definition in the *Manual* or the *Benchbook*. Likewise, the military does not define "good order and discipline" in its law, regulations, or doctrine.²⁴⁷ Even though the Department of Defense alone has 317 "directives," 758 "instructions," and 168 "manuals," not one definition of this term could be found in any of these publications.²⁴⁸

A similar phenomenon exists for service regulations. Air Force Instruction 1-1, for example, states that maintaining good order and discipline "is paramount for mission accomplishment," but nowhere defines that term.²⁴⁹ Likewise, Army Regulation 600-200 states several times that the commander must maintain good order and discipline but contains no discussion of its meaning.²⁵⁰ A search of Department of Defense and service websites revealed similar results: numerous

²⁴³ UCMJ art. 134 (codified at 10 U.S.C. § 934 (2017)).

²⁴⁴ MCM, *supra* note 34, pt. IV, ¶ 60(c)(3).

²⁴⁵ U.S. Court of Appeals for the Armed Forces, *Core Criminal Law Subjects: Crimes: Article 134—General Article*, OPINIONS DIG., <http://www.armfor.uscourts.gov/newcaaf/digest/IIIA60.htm> (last updated November 17, 2017).

²⁴⁶ *See supra* notes 154-57 and accompanying text.

²⁴⁷ *See* Art. 1, Definitions (codified at 10 U.S.C.S. § 801 (2017)).

²⁴⁸ Defense Department ("DoD") directives, instructions, and manuals can be found at <http://www.dtic.mil/whs/directives/>. The author used a search engine to search DoD publications for the "good order and discipline" term, reviewing each responsive document for a definition.

²⁴⁹ AFI 1-1, *supra* note 27, ¶ 2.1.

²⁵⁰ AR 600-20, *supra* note 27.

references to good order and discipline but no substantive discussion of what it means or how it applies.²⁵¹ Even the 219-page *Dictionary of United States Army Terms*, which contains entries for terms such as “unit cohesion,” makes no attempt to define good order and discipline.²⁵²

Even finding contemporary secondary sources that attempt to define the term proves difficult. The Air Force’s *Military Commander and the Law* makes some effort, stating: “Commanders are responsible for maintaining good order and discipline within their command. Military discipline simply refers to a person’s ability to maintain self-control and conform to the military’s standards of conduct.”²⁵³ However, the guide does not cite to any source for this definition and is of limited authority in and of itself.²⁵⁴ In addition, the guide only defines “discipline,” not “good order,” and it seems overly narrow; if good order and discipline simply equates to self-control and conformance with standards, one wonders what the Article 134 element adds at all.²⁵⁵ In other words, if “prejudicial to good order and discipline” simply means that self-control and conformance with standards has been impaired, every act or omission that violates a law, rule, or custom necessarily prejudices good order and discipline. The terminal element would then add nothing except to say that the accused has not “controlled” him or herself or that some standard has been violated.

A prominent military justice textbook makes another effort to define the term:

“Good order and discipline” are familiar watchwords of military law. Discipline can be achieved both formally and informally. For example, military instruction, drills or simply “a word to the wise” can help instill discipline in military personnel. At times, informal—indeed, illegal—practices such as hazing can be thought of as a means of achieving discipline. The legal process for doing so can take a variety of forms, some of which are properly referred to as “summary” or “nonjudicial,” while others, typically reserved for graver forms of misconduct, involve a process that more or less resembles civilian criminal justice. Summary disciplinary cases vastly outnumber courts-martial.²⁵⁶

This, of course, is not so much of a definition of the term as a statement of how it might be achieved. The textbook’s explanation is also somewhat at odds with the *Military Commander and the Law*’s definition above, as it is difficult to see how compliance with standards could be achieved through violating other standards through illegal practices such as hazing.²⁵⁷

²⁵¹ See U.S. DEP’T OF DEF., <https://search.defense.gov/search?affiliate=dod-search&query=good%20order%20and%20discipline> (last visited Sept. 10, 2017).

²⁵² U.S. Dep’t of Army, Army Reg. 310–25, *Dictionary of United States Army Terms* (Oct. 15, 1983), <https://fas.org/irp/doddir/army/ar310-25.pdf>.

²⁵³ THE MILITARY COMMANDER AND THE LAW 119 (Richard A. Gittins ed., 3d ed. 1996).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ EUGENE R. FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIALS 133 (2007).

²⁵⁷ Article 93 of the UCMJ criminalizes “cruelty and maltreatment,” which could encompass conduct such as hazing. UCMJ art. 93 (codified at 10 U.S.C. § 893 (2016)). Service regulations also prohibit such actions. See AFI 1–1, *supra* note 27, ¶ 2.2.8 (“Airmen do not tolerate bullying, hazing, or any instance where an Airman inflicts any form of physical or psychological abuse

Some in the military have noted that good order and discipline lacks an effective definition. As early as 1949, an Air Command and Staff College paper concluded that “[i]t would appear that there is no definition” of military discipline.²⁵⁸ The ensuing decades have not provided any meaningful clarity. A recent law review article by an Air Force officer noted: “Despite the accepted norm that good order and discipline is important, the actual definition of the term is murky at best.”²⁵⁹ Similarly, a recent study about diversity in the military concluded, “[t]he concept of good order and discipline is “admittedly . . . somewhat vague.”²⁶⁰ Even the Navy’s senior enlisted sailor could not put the term into words, saying good order and discipline is “difficult to define but easy to sense.”²⁶¹

For that matter, it is not even clear whether good order and discipline refers to one unified matter or two related but distinct concepts. As discussed above, the term “good order and discipline” is a creature of military law and did not appear until the 1700s; before that, writings on the subject refer exclusively to “military discipline,” or more simply, “discipline.”²⁶² In common usage, the term is more often used singularly though far from universally so; a Google search for “good order and discipline is” revealed about 23,000 hits while “good order and discipline are” brought back about 9,900 results. Military regulations also use the term both ways, either as a singular concept²⁶³ or a plural one.²⁶⁴ No publication could be located that attempts to explain whether the phrase represents one idea or two.

Good order and discipline is an idea in search of a definition.²⁶⁵ This lack of a definition has not yet caused the courts to find Article 134’s clause 1 to be unconstitutionally vague, but it certainly has not inspired confidence with the courts or military justice reformers. The problem of a lack of definition has grown more

that degrades, insults, dehumanizes, or injures another Airman (unless it is part of an approved formal training program).”); AR 600–20, *supra* note 27, ¶ 4–19 (“Hazing, bullying, and other behaviors that undermine dignity and respect are fundamentally in opposition to our values and are prohibited. This paragraph is punitive.”); U.S. Dep’t of Navy, Secretary of Navy Instruction 1610.2A, *Department of the Navy (DON) Policy on Hazing* ¶ 4 (July 15, 2005) (“Hazing will not be tolerated by any member of the Navy or Marine Corps.”).

²⁵⁸ Herbert S. Ellis, *Is Discipline in the Air Force Adequate to Cope with Atomic War?* 4 (July 1949) (unpublished Air Command and Staff College research paper) (on file with author and at the Muir S. Fairchild Research Information Center at Maxwell Air Force Base, Alabama).

²⁵⁹ Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 521 (2014).

²⁶⁰ Jay Alan Sekulow & Robert W. Ash, *Religious Rights and Military Service, in ATTITUDES AREN’T FREE: THINKING DEEPLY ABOUT DIVERSITY IN THE US ARMED FORCES* 99, 126 n.101 (James E. Parco & David A. Levy eds., 2010).

²⁶¹ Stevens, *supra* note 26.

²⁶² See *supra* notes 21–43 and accompanying text.

²⁶³ See, e.g., AR 600–20, *supra* note 27, ¶ 4–12 (listing maintenance of good order and discipline as a goal (singular)).

²⁶⁴ See, e.g., AFI 1–1, *supra* note 27, ¶¶ 2.2, 2.2.5 (listing “good order” and “discipline” separately as elements that may adversely affect the Air Force mission).

²⁶⁵ This Article treats “good order and discipline” as a singular term throughout.

pronounced over time, as the nature of the military's mission, United States demographics, and society have all changed, obviating any unstated sense that might once have existed of what the term really means.

B. Changing Times

One book that does attempt to define discipline (though not necessarily good order) does so as follows:

Military discipline is intelligent, willing, and positive obedience to the will of the leader. Its basis rests upon the voluntary subordination of the individual to the welfare of the group. It is the cohesive force that binds the members of a unit, and its strict enforcement is a benefit for all. Its constraint must be felt not so much in the fear of punishment as in the moral obligation it imposes on the individual to heed the common interests of the group. Discipline establishes a state of mind that produces proper action and prompt cooperation under all circumstances, regardless of obstacles. It creates in the individual a desire and determination to undertake and accomplish any mission assigned by the leader.²⁶⁶

This is the most comprehensive, workable definition found on the subject. The definition is also fifty-seven years old and was not updated throughout several editions of the book over the ensuing decades.²⁶⁷ This is unfortunate because even if this guide once represented a commonly-held understanding of what good order and discipline means, the meaning of this broad concept is bound to transform over time.

Traditionally, the concept of good order and discipline centered on providing commanders with broad authority so they can keep tight control over their forces.²⁶⁸ This authority was considered necessary for two reasons. First, warfare is inherently chaotic. For instance, servicemembers are directed to engage in three unique and inherently unnatural actions: to kill other human beings, to risk being killed themselves, and when necessary, to refrain from killing others even when threatened.²⁶⁹ Moreover, servicemembers are asked to carry out these actions under harsh, stressful, and confusing conditions.²⁷⁰ Carl von Clausewitz's *On War* captured this most famously, stating that "[w]ar is the realm of uncertainty; three quarters of the factors in which war is based are wrapped in a fog of greater or lesser uncertainty."²⁷¹ Thus, under the traditional view, commanders must be granted authority to a degree not acceptable in civilian society to instill in their charges

²⁶⁶ JEFFREY C. BENTON, AIR FORCE OFFICER'S GUIDE 41 (35th ed. 2008) (quoted in Ghiotto, *supra* note 259, at 522–23).

²⁶⁷ Ghiotto, *supra* note 259, at 523.

²⁶⁸ Kenneth M. Theurer & James W. Russell, III, *Why Military Justice Matters*, 37 THE REPORTER 8 (2010).

²⁶⁹ *Id.*

²⁷⁰ CARL VON CLAUSEWITZ, ON WAR 101 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1976) (c. 1780–1831).

²⁷¹ *Id.*

absolute, conditioned obedience to authority even in the midst of chaos, when military members' natural tendencies would be to do the opposite of what is demanded.²⁷²

The second traditional reason good order and discipline has normally been equated with near-absolute command authority is the fear of a military that becomes too powerful and oversteps its limited defense role. A military force that lacks good order and discipline risks committing war crimes or even upending civilian control over military forces.²⁷³ John Keegan's classic work *The Face of Battle* captured this fear well:

Inside every army is a crowd struggling to get out, and the strongest fear with which every commander lives—stronger than his fear of defeat or even of mutiny—is that of his army reverting to a crowd through some error of his making. For a crowd is the antithesis of an army, a human assembly animated not by discipline but by mood, by the play of inconstant and potentially infectious emotion which, if it spreads, is fatal to an army's subordination.²⁷⁴

Throughout much of military history, these two concepts forged the concept of good order and discipline. Commanders were thought to require a free hand, ruling their commands with near-absolute authority and granted the freedom to apply, when necessary, harsh methods that would not be permissible elsewhere.²⁷⁵ However, the environment in which the military operates has changed in recent decades. The nature of warfare, the pool of people from which the military draws, and society's expectations on how military members will be treated all have undergone significant modifications. The formation of an all-volunteer force has brought different demographics, attitudes, and challenges to the military.²⁷⁶ Thus, the meaning of good order and discipline needs to adapt as well. As one 1972 military research paper noted: "Historically, discipline has been the cornerstone of all military organizations. Unfortunately, the cornerstone has never remained cemented in place."²⁷⁷ To the ancient Greeks, good order and discipline meant fighting in close formation with the phalanx, which relied on each man holding his position and using his shield to protect the person to his right to allow the individuals to form a more cohesive and effective

²⁷² VEGETIUS, *supra* note 22, at 39 (opining that training instills "exact observance of discipline . . . and unwearied cultivation of the other arts of war"); Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 484 (1971) ("Discipline instills in a soldier a willingness to obey an order no matter how unpleasant or dangerous the task to be performed.") [hereinafter Nichols, *Justice of Military Justice*].

²⁷³ JOHN KEEGAN, *THE FACE OF BATTLE* 163 (1976).

²⁷⁴ *Id.* at 173.

²⁷⁵ *Id.*

²⁷⁶ See generally BETH BAILEY, *AMERICA'S ARMY: MAKING THE ALL-VOLUNTEER FORCE* (2009) (detailing the development of an all-volunteer force and how changes in American culture and demographics affected the Army's composition).

²⁷⁷ Billy J. Helton, "Discipline—An Unsolved Problem" 1 (May 1972) (unpublished research paper, Air Command and Staff College) (copy on file with author and at the Muir S. Fairchild Research Information Center at Maxwell Air Force Base, Alabama).

fighting unit.²⁷⁸ But would good order and discipline necessarily mean the same thing to the Roman Republic, which employed a more flexible form of maneuver warfare?²⁷⁹ Would it mean the same thing in the age of muskets or nuclear weapons, or of Abu Ghraib or Twitter? The answer, obviously, is no—good order and discipline is not a “fire and forget” term; each generation, each service, and each unit must define what it means in that given situation.

The *Levy* concurring and dissenting opinions framed this issue well.²⁸⁰ Some assume that warfare and military service embody certain timeless principles such as good order and discipline.²⁸¹ These people assert that “good order and discipline” may be more easily defined by common understanding and experience than words, but those who have served know exactly what it means.²⁸² On the other side stand those who mirror Justice Stewart’s *Levy* dissent, arguing that the military’s inability to define good order and discipline reflects a fundamental confusion about what this supposedly core concept means.²⁸³ They assert that the nature of military service has changed in modern times, and if the military wants to use good order and discipline as a rationale to support its policies and laws (including punishing conduct that prejudices it), it needs to be able to articulate exactly what good order and discipline is in today’s military.²⁸⁴

New questions about good order and discipline need to be asked and addressed. For example, the changing composition of the military raises new questions. In an environment where the military has to compete with other employers for trained, skilled, and educated people, can the military afford to hold to a more traditional view of good order and discipline that analogizes military members to children?²⁸⁵ Can the military afford to impose the sort of rigorous training methods unacceptable in civilian society that are traditionally associated with instilling good order and discipline?²⁸⁶ Is the fear of a military representing a “crowd struggling to get out” as prevalent today, with the tradition of civilian control of the military presumably more firmly

²⁷⁸ GREEK WARFARE: FROM THE BATTLE OF MARATHON TO THE CONQUESTS OF ALEXANDER THE GREAT 143 (Lee L. Brice ed., 2012).

²⁷⁹ Nathan Rosenstein, *Armies of the Roman Republic*, in *THE ANCIENT WORLD AT WAR 141–44* (Philip de Souza ed., 2008).

²⁸⁰ *Parker v. Levy*, 417 U.S. 733, 762–65 (1974) (Blackmun, J., concurring); *id.* at 766–72 (Douglas, J. dissenting); *id.* at 773–89 (Stewart, J., dissenting).

²⁸¹ *Id.* at 762–64 (Blackmun, J., concurring).

²⁸² *Id.* at 748 (majority opinion).

²⁸³ *Id.* at 774–75 (Stewart, J., dissenting).

²⁸⁴ *Id.* at 788.

²⁸⁵ Ellis, *supra* note 258, at 11–12 (comparing the use of discipline to train new soldiers for combat to a mother slapping her child’s hand to keep the child from touching fire and hurting himself).

²⁸⁶ WILLIAM ERNEST HOCKING, *MORALE AND ITS ENEMIES* 119–20 (1918) (discussing the need to impose a loss of personal freedom and arbitrary stress in order to impose discipline; discipline “means subjections of the body to the mind; it means the superiority of the human spirit to the last efforts of wind and weather, and the demons of fear, pain, and fatigue. It is the element of Stoicism without which no man can do his living well.”).

entrenched?²⁸⁷ What does good order and discipline mean when a majority of military members are married and over age twenty-five, and their education levels continue to rise, with most having at least some college education?²⁸⁸ Should commanders continue to hold a high degree of authority, when their subordinates may be increasingly mature and thus better able to discipline themselves?²⁸⁹

The nature of military missions has also changed. Modern American warfare is often more scientific and distant than the fighting associated with traditional good order and discipline notions.²⁹⁰ Increasingly, the military relies on standoff weapons, unmanned aerial vehicles, or even autonomous weapons systems.²⁹¹ In such an age, to what degree does Clausewitz's warning about war's "primordial violence, hatred, and enmity" tendency apply, and what role does good order and discipline play in constraining this irrational tendency?²⁹² In any event, *how* does good order and discipline effect these three unnatural actions? Is it by conditioned obedience to authority, as several traditional works argue and some views still hold?²⁹³ What does good order and discipline mean in an age where unquestioning obedience could

²⁸⁷ KEEGAN, *supra* note 273, at 163.

²⁸⁸ U.S. DEP'T OF DEF., OFFICE OF DEPUTY ASSISTANT SEC'Y OF DEF. FOR MILITARY CMTY. & FAMILY POLICY, 2015 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 8, 39 (2015).

²⁸⁹ James Dao, *Older Recruits Challenge Army and Vice Versa*, N.Y. TIMES, June 17, 2009, at A1.

²⁹⁰ Mark Stout, *Where Has All the Hatred Gone?*, WAR ON THE ROCKS (Nov. 13, 2015), http://warontherocks.com/2015/11/where-has-all-the-hatred-gone/?utm_source=WOTR+Newsletter&utm_campaign=WOTR_Newsletter_8_17_158_15_2015&utm_medium=email&utm_term=0_8375be81e9d5cffdd132-82946029 (noting that modern warfare has "largely removed the people from military affairs," and speculating whether "modern, Western militaries don't need hatred because their members are more distinct and more disconnected from vast swathes of the population than they were in a nation mobilized for war.").

²⁹¹ See generally Jason S. DeSon, *Automating the Right Stuff? The Hidden Ramifications of Ensuring Autonomous Aerial Weapon Systems Comply with International Humanitarian Law*, 72 A.F. L. REV. 85 (2015); Benjamin Kastan, *Autonomous Weapons Systems: A Coming Legal "Singularity"?*, 2013 U. ILL. J.L. TECH. & POL'Y 45 (2013); Jay Logan Rogers, *Legal Judgment Day for the Rise of the Machines: A National Approach to Regulating Fully Autonomous Weapons*, 56 ARIZ. L. REV. 1257 (2014).

²⁹² CLAUSEWITZ, *supra* note 270, at 83.

²⁹³ DEF. LEGAL POLICY BD., REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 21 (2013), <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA585350> ("Because 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' the military is separate from civilian society and it 'must insist upon respect for duty and a discipline without counterpart in civilian life.'") (first quoting *Toth v. Quarles*, 350 U.S. 11, 17 (1955); then quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974); and then quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)) (internal citations omitted); VEGETIUS, *supra* note 22, at 39 (opining that training instills "exact observance of discipline . . . and unwearied cultivation of the other arts of war"); Nichols, *Justice of Military Justice*, *supra* note 272, at 484 ("Discipline instills in a soldier a willingness to obey an order no matter how unpleasant or dangerous the task to be performed.").

contribute toward wartime atrocities?²⁹⁴ Additionally, modern warfare often employs smaller, more disbursed units tasked to operate with flexibility and initiative.²⁹⁵ How does this affect good order and discipline's meaning? Does the changing nature of warfare change the whole idea of good order and discipline from a fairly clear tactical meaning (failure to follow orders in combat can get nearby people killed unnecessarily or cause mission failure) to a more broad, amorphous meaning involving some mix of unit cohesion, deterrence, accountability, military culture, or command control?²⁹⁶

The fact that good order and discipline has not been defined clearly may be somewhat understandable. The concept is elusive, and a definition that works for the Air Force finance unit may not perfectly apply to an Army or Marine Corps expeditionary combat unit.²⁹⁷ However, the problem is not that the military has tried and failed to reach an agreement about good order and discipline's meaning. Rather, the military exhibits an almost total lack of interest in even having the conversation.²⁹⁸ More and more in modern times, the good order and discipline term is not explored in any depth. A Google NGram report shows that the percentage of English language books discussing good order and discipline has steadily fallen between 1800 and 2008, to the point where the frequency of book-based discussion of the term is now less than a quarter of what it was in the early 1800s.²⁹⁹ During the same period, the percentage of books discussing the military generally has actually increased slightly.³⁰⁰ Searches of research papers from the Army, Navy, and Air Force's senior developmental education schools for rising senior officers revealed several papers mentioning the term in passing, but almost none make any attempt to address what good order and discipline means, at least in recent years.³⁰¹ Unfortunately, this failure to substantively

²⁹⁴ See generally Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939 (1998).

²⁹⁵ Christopher E. Van Avery, *12 New Principles of Warfare*, ARMED FORCES J. 24, 24 (July 2007).

²⁹⁶ Andrew T. Horne, *Unit Cohesion?*, 85 MARINE CORPS GAZETTE 45 (2001) (defining good order and discipline in terms of unit cohesion); Donald G. Rehkopf Jr., *Commentary & Reply, On "The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations"*, 41 PARAMETERS 87, 90 (2011) (equating good order and discipline with deterrence); Miranda Johnson, *How Would the Lack of Discipline and Standards Affect the Army Profession?*, U.S. ARMY MED. RES. & MATERIAL COMMAND (Feb. 2013), <http://mrmc.amedd.army.mil/content/awards/docs/2013feb-essaywinner.pdf> ("Through the teaching and instilment [sic] of Army standards and discipline, we honor and respect the rich heritage which the Army is founded upon, while also ensuring the future success of the Army by inspiring us to adhere to and exceed the standard.").

²⁹⁷ Stevens, *supra* note 26.

²⁹⁸ Alexander Nicholson, *The 'Good Order and Discipline' Auto-Block in Making Military Policy*, HUFFPOST: THE BLOG (June 24, 2013 5:50 PM), https://www.huffingtonpost.com/alexander-nicholson/military-reforms_b_3491120.html.

²⁹⁹ The data can be found by searching "good order and discipline." *Google Books Ngram Viewer*, GOOGLE, <https://books.google.com/ngrams/>.

³⁰⁰ The data can be found by searching "military." *Google Books Ngram Viewer*, GOOGLE, <https://books.google.com/ngrams/>.

³⁰¹ One notable exception is Anthony J. Ghiotto, *Back to the Future With the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice*

discuss good order and discipline comes at precisely the time when the military needs this discussion the most.

C. Overuse—Good Order and Discipline Fatigue

The lack of a standardized definition and the changes that have occurred within the military in recent decades have likely contributed to the diminution of the good order and discipline rationale, but the manner in which military leaders have used the term has damaged the term's rhetorical impact far more. In recent decades, military leaders' summary, short-hand use of the term has led to widespread critique that "good order and discipline" is nothing more than military slang for "we don't like something but we don't want to explain why."³⁰² Time after time since the mid-1900s, military leaders have used the term to voice their opposition to proposed reforms of the Pentagon's personnel, social, or disciplinary policies, reforms aimed at accommodating modern sensibilities.³⁰³ Each time these reforms were proposed, the military pushed back, shrouding its objections in the language of good order and discipline.³⁰⁴

Law and tradition in the decades leading up to World War II supported the United States military services' policy of racial segregation.³⁰⁵ However, the large-scale mobilization of World War II challenged the military's racial segregation practices as never before. Challenges to racial segregation grew as United States citizens witnessed the skill of the Tuskegee Airmen,³⁰⁶ the unjust court-martial of Lieutenant Jackie Robinson,³⁰⁷ and the general bravery of more than 460,000 African-Americans serving in the war.³⁰⁸ The experiences of World War II combined with the burgeoning civil

System, Due Process, and Good Order and Discipline (April 2014) (unpublished Air Command and Staff College research paper) (on file with author and at the Muir S. Fairchild Research Information Center at Maxwell Air Force Base, Alabama). This paper was later published in the University of North Dakota Law Review. *See generally* Ghiotto, *supra* note 259.

³⁰² *See, e.g.*, JAMES BOWMAN, ETHICS & PUB. POL'Y CTR., DON'T CHANGE "DON'T ASK, DON'T TELL" (2009), <https://eppc.org/publications/dont-change-dont-ask-dont-tell/> (asserting that the experience of other nations who have allowed homosexual individuals to openly serve in the military has "been such as to render all suspicion of damage to morale, good order, and discipline ridiculous" and speculating that "[m]aybe good order and discipline are themselves now to be thought the concerns only of 'bigots.'").

³⁰³ *See id.*; *see also* F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 299–300 (2000); Kate Germano, Opinion, *Mike Pence Said in 1999 that Women Shouldn't Be in the Military. So Much Has Changed*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/08/03/mike-pence-said-in-1999-that-women-shouldnt-be-in-the-military-so-much-has-changed/?utm_term=.e9072a42dd2e.

³⁰⁴ Austin Wright & Jeremy Herb, *Military Reform Effort Claims Latest Casualty*, POLITICO (Apr. 18, 2016), <http://www.politico.com/story/2016/04/defense-pentagon-brad-carson-222064>.

³⁰⁵ MORRIS J. MACGREGOR JR., INTEGRATION OF THE ARMED FORCES 1940–1965 7 (1980).

³⁰⁶ *See generally* Higginbotham, *supra* note 303, at 273.

³⁰⁷ BRAY, *supra* note 35, at 225–30.

³⁰⁸ RICHARD M. DALFUME, DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939–1953 44 (1969).

rights movement to pressure the services into reexamining their traditional practices of segregation, but the military clung to its segregationist practices in the face of numerous challenges, many of which were brought by members of the armed forces.³⁰⁹

A post-war survey of Army officers indicated widespread concerns about desegregation, with most officers labelling desegregation as “bordering on irresponsibility” in large part because of the importance of the military’s social order.³¹⁰ At times, the military defended its system of racial segregation on the grounds that integration “would interrupt the morale, discipline, and efficiency of fighting units.”³¹¹ Secretary of the Army Kenneth Royall cited factors such as cohesion, morale, and discipline in cautioning against racial integration in the military.³¹² General Omar Bradley supported integration “as fast as our social customs will permit,” but warned that forcing “complete integration might seriously affect morale and thus affect battle efficiency.”³¹³ The Chairman of the Navy’s General Board argued that in the close conditions inherent in military life, integration would cause a “lowering of contentment, teamwork, and discipline in the service.”³¹⁴ Likewise, the Secretary of the Navy predicted that if black military members rose to leadership positions, they would prove unable to effectively discipline white subordinates, leading to a loss of “teamwork, harmony, and efficiency.”³¹⁵ Ultimately, President Truman issued an executive order ordering equal treatment and opportunity for all military members.³¹⁶

This pattern has repeated itself twice in recent decades. In the 1990s, shortly after the election of President Bill Clinton, the White House pushed the Pentagon to lift the long-standing ban on homosexuals openly serving in the military.³¹⁷ Military leaders, including Generals Norman Schwarzkopf and Colin Powell, opposed the change by

³⁰⁹ Higginbotham, *supra* note 303, at 274–75.

³¹⁰ MACGREGOR JR., *supra* note 305, at 143.

³¹¹ Garry L. Rolison & Thomas K. Nakayama, *Defensive Discourse: Blacks and Gays in the U.S. Military*, in *GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS* 121, 128 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994).

³¹² Laura R. Kesler, *Serving with Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and Its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 *MIL. L. REV.* 284, 345–46 (2010) (citing Memorandum from Kenneth C. Royall, Sec’y of the Army, to the Honorable Clark Clifford (Mar. 29, 1949), https://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=pdf&documentid=4-17).

³¹³ *Id.* at 346 (quoting General Omar Bradley, Chief of Staff, Statement Before the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces (Mar. 28, 1949), https://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=pdf&documentid=10-1).

³¹⁴ *Id.* (quoting David A. Bianco, *Echoes of Prejudice*, in *GAY RIGHTS, MILITARY WRONGS* 47, 57 (Craig A. Rimmerman ed., 1996)).

³¹⁵ *Id.* at 346–47 (quoting Bianco *supra* note 314, at 57).

³¹⁶ Exec. Order No. 9981, 13 *Fed. Reg.* 4,313 (July 28, 1948).

³¹⁷ Barton Gellman, *Clinton Says He’ll “Consult” on Allowing Gays in Military; Advisers Warn of Likely Repercussions*, *WASH. POST*, Nov. 13, 1992, at A1.

citing the importance of unit cohesion.³¹⁸ However, “good order and discipline” also formed a central tenet of the generals’ opposition,³¹⁹ with General Powell telling the media, “[t]he military leaders in the armed forces of the United States—the Joint Chiefs of Staff and the senior commanders—continue to believe strongly that the presence of homosexuals within the armed forces would be prejudicial to good order and discipline.”³²⁰ Other generals echoed the “good order and discipline” justification for maintaining the ban,³²¹ and Congress ultimately accepted these concerns in enacting the so-called “Don’t Ask, Don’t Tell” law by finding that the “presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”³²² Seventeen years later, military leaders’ reaction to proposals to lift the ban read much differently, as leaders such as Army Chief of Staff General George Casey stated they no longer believed the presence of homosexual service members caused an unacceptable risk to good order and discipline.³²³ Congress repealed the ban in December 2010.³²⁴ The Pentagon smoothly implemented the change in policy, with officials citing no adverse effect to the change.³²⁵

A similar pattern emerged with various proposals to expand opportunities for women in the military, including lifting the combat exclusion.³²⁶ Early in the evolution

³¹⁸ Sam Nunn, *The Fundamental Principles of the Supreme Court’s Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 559–61 (1994).

³¹⁹ See Fred L. Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189, 200 (2010) (stating that after the late 1970s, when the medical community no longer held that gay and lesbians were sexual deviants and there was no medical basis to exclude them from military service, “the Army now relied completely on good order and discipline as a rationale.”); Carla Crandall, *The Effects of Repealing Don’t Ask, Don’t Tell: Is the Combat Exclusion the Next Casualty in the March Toward Integration?*, 10 GEO. J.L. & PUB. POL’Y 15, 21 (2012) (observing that after 1973, the “primary justification” for excluding gays and lesbians from openly serving in the armed forces “was prejudicial to ‘good order and discipline.’”) (citing Borch, *supra* note 319, at 200).

³²⁰ John H. Cushman Jr., *The Transition: Gay Rights; Top Military Officers Object to Lifting Homosexual Ban*, N.Y. TIMES, at 9 (Nov. 14, 1992), <http://www.nytimes.com/1992/11/14/us/the-transition-gay-rights-top-military-officers-object-to-lifting-homosexual-ban.html>.

³²¹ *Id.*

³²² 10 U.S.C. § 654(a)(15) (1993).

³²³ Elisabeth Bumiller, *Debate Shifts to When to End ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Dec. 4, 2010, at A13.

³²⁴ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (repealing 10 U.S.C. § 654).

³²⁵ David Crary, *After ‘Don’t Ask, Don’t Tell’ Repeal, Few Signs of Strife*, WASH. POST, Sept. 17, 2012, at A13; Anna Mulrine, *Panetta: No Hitches in Military’s Repeal of ‘Don’t Ask, Don’t Tell’*, CHRISTIAN SCI. MONITOR (May 10, 2012), <https://www.csmonitor.com/USA/Military/2012/0510/Panetta-No-hitches-in-military-s-repeal-of-don-t-ask-don-t-tell>.

³²⁶ For a history of restrictions on women’s opportunities in the military, see Crandall, *supra* note 319, at 25–27.

of policies regarding women in combat roles, military leaders resisted change, citing “good order and discipline” as one of the primary justifications for their position.³²⁷ However, a series of moves opened additional combat opportunities for women, and in late 2015, the Secretary of Defense announced women would now be eligible to serve in combat, even as some military members continued to contest the move on good order and discipline grounds.³²⁸ To date, military leaders cite no adverse effect on good order and discipline from the move.³²⁹

In the past few years, the trend has continued with efforts to reform the military justice system to bring it closer in line to civilian practices. Driven largely by concerns about the military’s handling of sexual assault cases, recent National Defense Authorization Acts have imposed significant reforms, from providing a statutory set of rights to victims to reforming pretrial hearings to amending the Military Rules of Evidence.³³⁰ Most controversial, however, have been proposals to reduce the role commanders play in the military justice process or even remove them from the process altogether.³³¹ Recent reforms have already dramatically limited the ability of commanders who convene courts-martial to grant clemency to convicted service members after trial.³³² However, some Congressional leaders and special interest groups—led by Senator Kirsten Gillibrand—have pushed for even more dramatic reforms that would remove commanders from the decision-making process in courts-martial³³³ and replace them with legal experts.³³⁴ Military leaders have opposed such

³²⁷ See *id.* at 32–34 (citing “unit discipline, order, and morale,” as one of the primary objections to allowing women to serve in combat roles); Stephanie Saul, *Equal Opportunity Combat? Rules Banning Women Could Be Rescinded*, *NEWSDAY*, May 21, 1991, at 4 (quoting Robert F. Dunn, a retired Navy admiral, that placing men and women together on combat ships is “prejudicial to good order and discipline”).

³²⁸ William Denn, *Women Deserve a Fighting Chance*, *WASH. POST*, Apr. 4, 2014, at A17 (supporting military leaders’ support for additional opportunities for women, but noting that “[m]any servicemen resist the idea, citing studies that suggest the inclusion of women in combat would imperil unit effectiveness, good order and discipline.”); Dan Lamothe, *Combat Units Are Opened to Women*, *WASH. POST*, Dec. 4, 2015, at A1 (covering the announcement of additional opportunities for women).

³²⁹ See, e.g., Thomas Gibbons-Neff, *For New Marine Commandant, the Issue of Women in Combat Is Already Moot*, *WASH. POST*, Oct. 5, 2015, at A11 (citing comments by the Marine Corps Commandant and Secretary of the Navy that changes regarding women in combat would not cause any negative impact on military operations or units).

³³⁰ See *supra* note 13 and accompanying text (highlighting changes to the military justice system in recent National Defense Authorization Acts).

³³¹ Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, *CNN* (June 5, 2013), <http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/index.html>.

³³² National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1702, 127 Stat. 672 (2013) (limiting a convening authority’s ability to alter findings and sentence at clemency except in narrow circumstances).

³³³ See *supra* note 36 and accompanying text.

³³⁴ See *supra* notes 9–10 and accompanying text.

proposals, largely rooting their objections in terms of good order and discipline.³³⁵ This time, however, the good order and discipline justification showed it had started to lose its rhetorical weight, coming on the heels of similar objections to proposals for racial, gender, and sexual orientation-based integration.

Senator Gillibrand, for example, expressed skepticism about military leaders' good order and discipline-based rationale for maintaining commanders' authority over courts-martial. In a *Washington Post* editorial, Gillibrand wrote:

The Defense Department tells us that if 3 percent of the most senior commanders don't have the sole authority to decide whether a person accused of rape should be prosecuted, we will lose good order and discipline in our military. That same argument was used against integrating the services; against allowing women to serve; against repealing don't ask, don't tell; and against allowing women in combat. It wasn't true then, and it isn't true now.³³⁶

In a 2013 hearing, she similarly stated:

When we tried to repeal don't ask, don't tell, military commanders said you cannot possibly do this; this will undermine good order and discipline. When we wanted women to be able to serve in the military, they said you cannot possibly do that because of good order and discipline. When we integrated the armed services, commanders said you cannot possibly do this; it will undermine good order and discipline. We did it. We did every single one of those reforms.³³⁷

Senator Gillibrand was not the first member of Congress to make such an observation. Three years earlier, as Congress repealed "Don't Ask, Don't Tell," Congressman Bobby Rush made a similar connection: "[C]ritics of this amendment, and the repeal effort, have often stated that allowing open service will 'disrupt unit cohesion' and lead to a breakdown in 'good order and discipline.' These are the same arguments that were used in the 1940s to object to the integration of America's armed forces."³³⁸ Even as early as 1992, Representative Dave McCurdy posited that with the changing nature of society, the military, and warfare, "I think [the military is] going to have to define what 'good order and discipline' mean now."³³⁹

These Congressional members' criticisms have found increasing support in recent years, as the media and other commenters have questioned whether good order and discipline reflects a core principle of military effectiveness or the military's rhetorical shortcut to voice its opposition to proposed reforms.³⁴⁰ Observing the military's

³³⁵ See *supra* note 12 and accompanying text.

³³⁶ Kirsten Gillibrand, *Justice for Military Victims of Sexual Assault*, WASH. POST, May 27, 2016, at A17.

³³⁷ 159 CONG. REC. S8,041 (daily ed. Nov. 14, 2013) (statement of Sen. Gillibrand).

³³⁸ 111 CONG. REC. E1,051 (daily ed. June 9, 2010) (statement of Rep. Rush).

³³⁹ Melissa Healy, *New Set of Marching Orders*, L.A. TIMES, Nov. 2, 1992, at A1.

³⁴⁰ Christie Thompson, *Five Ways Congress Is Trying to Curb Rape in the Military*, PROPUBLICA (June 5, 2013), <https://www.propublica.org/article/five-ways-congress-is-trying-to-curb-rape-in-the-military>.

opposition to removing commanders from the court-martial process, one newspaper editorial claimed that opposition from military leaders on reducing commanders' role in the system "is more about refusal to give up turf and authority than genuine concern for good order and discipline."³⁴¹ Another columnist asserted that without taking concrete steps to better recruit, train, and mentor women and thereby end sexual assault in the ranks, good order and discipline claims remained "just Pentagon rhetoric."³⁴² A third editorial called the military's assertions "a red herring," as the military justice system allows offenders to escape the consequences of their actions; the editorial rhetorically asked, "Where is the good order and discipline in that?"³⁴³

Other commenters place the military's stance on military justice reforms in a broader context, mirroring the skepticism expressed above by members of Congress.³⁴⁴ These critics see the military's good order and discipline-based concerns to military justice reforms as part of a pattern of intransigence that dates back decades, mirroring the military's objections to proposed racial, gender, and sexual orientation-based changes.³⁴⁵ A *Huffington Post* writer asserted:

[T]he insufficiency of [the good order and discipline] catch phrase as justification for opposing policy changes on issues of critical importance to our nation sound[s] eerily familiar to those of us involved in previous efforts to change military policies that were likewise opposed due to "good order and discipline." Had we blindly obeyed, in response to the tactical deployment of this catch phrase in the past, we would not have integrated units, we would not have such a wide array of military occupational specialties open to women, and troops could still be fired if they were discovered to be gay or lesbian. All of these changes in military policy took place against the recommendation of many senior defense leaders and under the threat that such changes would negatively impact good order and discipline and impair the ability of military commanders—and the military as a whole—to function. We now know, however, that each of these changes not only did not corrode military and command capabilities, but instead greatly enhanced the capability and reputation of our armed forces³⁴⁶

A Chicago Tribune opinion piece made a similar observation when military leaders cited good order and discipline to oppose military justice reforms.³⁴⁷ The criticism is lengthy but illuminating of changing views on the willingness to defer to senior military leaders' claims of what good order and discipline demands:

³⁴¹ Editorial, *Commanders a Big Part of the Problem*, SAN ANTONIO EXPRESS-NEWS, Dec. 9, 2013, at A12.

³⁴² Anu Bhagwati, *Ending Sexual Assault in the Military*, WASH. POST, May 26, 2013, at B3.

³⁴³ *To Fight Sex Crimes, Fix Military Justice*, TAMPA BAY TIMES, Apr. 13, 2013, at 12A.

³⁴⁴ Nicholson, *supra* note 298.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Steve Chapman, Opinion, *Military Brass Play Same Old Song: Resisting Measures to Combat Sexual Assault*, CHI. TRIB., July 25, 2013, at C23.

Does that line of argument sound familiar? It should. It's exactly what the military has said whenever it has been presented with a new requirement proposed by elected officials dissatisfied with existing policy.

In 1941, Army Chief of Staff Gen. George Marshall advised that efforts to bring about racial integration "are fraught with danger to efficiency, discipline or morale." Adm. Chester Nimitz agreed that segregation was essential to "harmony and efficiency aboard ship."

The brass took the same view of admitting women to the service academies. In 1974, Lt. Gen. Albert Clark, superintendent of the Air Force Academy, said "the introduction of female cadets will inevitably erode this vital atmosphere." When the idea of putting women on Navy ships arose, a survey of sailors found most thought it would have "a negative impact on discipline."

We got a reprise of this critique whenever anyone mentioned allowing gays in the military. During the 2010 debate in Congress, more than 1,000 former generals and admirals signed a letter saying the ban was needed to "protect good order, discipline and morale."

But somehow our military managed to survive putting blacks and whites in the same billets. Somehow it became the most powerful fighting force on Earth following the intrusion of females. A year after gays were admitted, [General James F.] Amos said, "I'm very pleased with how this turned out."

The people in charge of the services may have the best of intentions in dealing with sexual assault. But they have a habit of rejecting reasonable changes on the basis of fears that turn out to be unfounded.³⁴⁸

These two broader critiques do not stand alone; instead criticism about the military's "good order and discipline" justification seem to be growing.³⁴⁹ A 1997

³⁴⁸ See *id.*

³⁴⁹ See Nathaniel Frank, "Don't Ask, Don't Tell" Was Always on Shaky Grounds, USA TODAY, Mar. 12, 2009, at 9A ("Every time the military has been consulted on [the issue of lifting the ban on homosexual servicemembers openly serving], it has trotted out the old 'unit cohesion' argument, which asserts that openly gay servicemembers would weaken the military by hurting morale, recruitment, good order and discipline."); David McCumber, *Military Defending the Indefensible on Capitol Hill*, SAN ANTONIO EXPRESS-NEWS, June 11, 2013, at A13; David McCumber, *Trenching up in the Hearing Room*, NEWSTIMES.COM (June 6, 2013) (noting that current military objections about military justice proposals "might have a little more credence if previous generations of leaders had not been equally forceful, in other years, in other hearing rooms, defending other pieces of indefensible ground. Ending 'don't ask don't tell' would destroy military discipline, we were told. The same with giving women any meaningful role in the military. The same with racially integrating military units."); Nathaniel Penn, "Son, Men Don't Get Raped," 84 GQ, no. 9, Sept. 2014, at 244 (citing the "myth of 'good order and discipline'"); Andre Sauvageot, Letter to the Editor, *Gays in the Military: Same Old Arguments*, WASH. POST, June 24, 2009, at A26 ("Arguments citing 'good order and discipline' or the morale of the troops living in close quarters were also used against integrating African Americans. President Harry S. Truman courageously overcame such bigoted sophistry; we

Newsday piece captured the sentiment many others would express later: the Pentagon's use of good order and discipline "repeats—like a mantra—phrases such as 'unit cohesion,' 'morale and welfare' and 'service discrediting' as if the very repetition of these clichés will prove its point."³⁵⁰

Elsewhere, the author has empirically studied the validity of these allegations and found merit in them. That study will not be repeated here. In summary, that study revealed that critics' concerns may have merit; military leaders' use of the term has primarily come in opposition to proposed social, personnel, and military justice reforms and has reflected less substantive examination than cursory reflex.³⁵¹ As a result, critics unsurprisingly have begun to allege that "good order and discipline" serves as a rhetorical device for the military to oppose proposals it does not like, rather than a meaningful operational concept.³⁵²

D. *The Increasing Civilianization of Military Justice*

In 2013, Undersecretary of the Navy nominee Dr. Jo Ann Rooney ran into difficulty during Congressional testimony when she expressed concern about having a judge advocate make court-martial decisions instead of a commander.³⁵³ Her statement, "I believe the impact would be decisions based on evidence rather than the interest in preserving good order and discipline," drew Senator Gillibrand's

should do the same today."); Ari Ezra Waldman, Commentary & Reply, *Military Justice is Alive and Well*, 41 *PARAMETERS* 124, 130 (2011) ("The only time servicemembers voiced concerns about unit cohesion, order, and discipline was when they fell back on stereotypes of effeminate men, unwanted sexual advances, and inappropriate displays of affection.") (citing U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 1, 5, 102, 122 (2010)); Owen West, Opinion, *An About-Face on Gay Troops*, N.Y. TIMES, Feb. 8, 2009, at A23 (comparing military leaders' objection concerning racial integration to objections concerning lifting the ban on homosexual servicemembers openly serving and concluding that the objections sound like "worn-out dogmas").

³⁵⁰ David P. Sheldon, *Military Should Cool It on Adultery*, *NEWSDAY*, June 17, 1997, at A31.

³⁵¹ Jeremy S. Weber, *The Disorderly, Undisciplined State of the "Good Order and Discipline" Term* (Feb. 16, 2016) (unpublished academic research report submitted in partial fulfillment of graduation requirements, Air War College, Air University), www.dtic.mil/doctrine/education/jpme_papers/weber_j.pdf. In summary, this research studied 264 instances in which military leaders used the phrase publicly in recent decades, and concluded that nearly 80 percent of the time, military leaders used the phrase in response to proposed reform to military policies (largely in opposition to such policies), while almost all the references to the term were made in a conclusory or summary manner rather than reflecting an attempt to convey what good order and discipline means and why it supported the leaders' position. The research also involved a survey of senior Air Force officers and enlisted members, which revealed significant underlying disagreement about what good order and discipline means.

³⁵² Chapman, *supra* note 347.

³⁵³ Austin Wright & Darren Samuelsohn, *Navy Nominee Stirs Controversy*, *POLITICO* (Oct. 11, 2013), <http://www.politico.com/story/2013/10/navy-nominee-jo-ann-rooney-stirs-sexual-assault-controversy-098163>.

criticism,³⁵⁴ and the White House ultimately withdrew the nomination.³⁵⁵ The withdrawal of Dr. Rooney's nomination, however, highlights a long-standing unresolved question: What is the relationship between justice in a legal sense and good order and discipline? The traditional view was that good order and discipline demanded suppression of some legal rights, a view that lasted until World War II.³⁵⁶ After the war, however, Congress attempted to balance the need for discipline with a more just system, aiming for "a middle ground between the viewpoint of the lawyer and the viewpoint of the general."³⁵⁷ This attempt to "balance" justice and discipline remains central in the military justice system, assuming some sort of tension between the two concepts.³⁵⁸ Some military leaders, though, have recently opined that no conflict exists between these ideas; instead, promoting justice automatically

³⁵⁴ *Id.*

³⁵⁵ Christopher P. Cavas, *White House Withdraws Nominee for Navy's No. 2 Post*, USA TODAY (Nov. 13, 2014), <http://www.usatoday.com/story/news/nation/2014/11/13/navy-rooney-nomination-withdrawn/18998941/>.

³⁵⁶ See *United States v. Bauerbach*, 55 M.J. 501, 502 (A. Ct. Crim. App. 2001) ("Up until World War I, commanders and the public felt that the disciplining of troops was primarily commanders' business, because a commander who could be trusted to take his troops into combat could also be trusted to treat them fairly in courts-martial."); SHERRILL, *supra* note 39, at 63–64 (expressing a traditional view that "[s]o long as a serviceman can assure himself, 'I have the right to act, within constitutional limits,' he is a potential troublemaker. The less assurance a serviceman has of possessing any practical rights, the more likely will he be to shrink from action beyond that authorized by command."); Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 426 (2008) ("From the colonial period until well into the twentieth century, U.S. military commanders enjoyed a position of almost absolute power within the military justice system."); John Henry Wigmore, *Lessons from Military Justice*, 4 J. AM. JUDICATURE SOC'Y 151 (1921) (quoted in Schlueter, *Justice or Discipline?*, *supra* note 5, at 22).

³⁵⁷ U.S. WAR DEP'T ADVISORY COMM. ON MILITARY JUSTICE, REPORT TO THE SECRETARY OF WAR 5 (1946), http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf.

³⁵⁸ MCM, *supra* note 34, pt. I, ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

strengthens good order and discipline.³⁵⁹ How exactly to “balance” two interests remains unclear.³⁶⁰

However, the balance increasingly is tilted in favor of justice over good order and discipline, as the system has been reformed to more closely mirror the civilian criminal justice system.³⁶¹ Whatever internal debate may fester about the relationship between justice on the one hand, and good order and discipline on the other, Congress has made it clear in recent years that it is increasingly concerned about the former, even at the possible expense of the latter.³⁶² The changes Congress has imposed upon the military justice system tilt in one direction only—toward the civilianization of military justice.³⁶³ As the military justice system grows to look more and more like its civilian counterpart, good order and discipline (whatever that term may mean) will naturally take a back seat in the system to due process and legal wrangling. Commanders, who maintain responsibility for maintaining good order and discipline, will revert to other means for carrying out their responsibilities.

As discussed above, the number of courts-martial and Article 15 actions has fallen precipitously in recent decades.³⁶⁴ A vicious circle thus ensues: the military has trouble articulating what good order and discipline is and what it requires, so Congress reforms military justice to emphasize justice over good order and discipline; commanders back out of the system, avoiding utilizing their primary tool for enforcing

³⁵⁹ COMM. FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMIN. OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND CHIEF OF STAFF, U.S. ARMY 43 (1971), https://www.loc.gov/frd/Military_Law/pdf/Report_General-Westmoreland.pdf (“To the extent that a court-martial is an instrument of justice and that our system of military justice is administered fairly and impartially, morale and discipline will be maintained and enhanced.”); COMM. ON THE UNIF. CODE OF MILITARY JUSTICE GOOD ORDER & DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER SECRETARY OF THE ARMY 11 (1960) (“[I]t is a mistake to talk of balancing discipline and justice—the two are inseparable. An unfair or unjust correction never promotes the development of discipline.”); Harding, *supra* note 25, at 5–6 (“By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America’s best and brightest; we demoralize and discourage the retention of currently-serving Airmen, who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.”).

³⁶⁰ MOYER, *supra* note 17, at 12 § 1-150 (“Is a criminal justice system whose object is ‘discipline’ characterized by features that distinguish it from a system whose object is ‘justice,’ or is the difference only semantic? If the difference is real, is the object of military justice discipline and, if so, should it be?”); Schlueter, *Justice or Discipline?*, *supra* note 5, at 74.

³⁶¹ BRAY, *supra* note 35, at xii–xiv; Dunlap, Jr., *supra* note 28, at 245 (observing that the military justice system’s balance has increasingly tilted toward justice and away from good order and discipline in recent decades).

³⁶² Charles D. Stimson & Steven P. Bucci, *Changing the Military Justice System: Proceed with Caution*, 2795 HERITAGE FOUND. BACKGROUNDER 2 (2013), <http://www.heritage.org/defense/report/changing-the-military-justice-system-proceed-caution>.

³⁶³ Charles Dunlap, *Civilianizing Military Justice? Sorry, It Can’t—and Shouldn’t—Work*, WAR ON THE ROCKS (Oct. 8, 2015), <https://warontherocks.com/2015/10/civilianizing-military-justice-sorry-it-cant-and-shouldnt-work/>.

³⁶⁴ See *supra* notes 229–41 and accompanying text.

good order and discipline; and good order and discipline suffer all the more. As one author observed:

For commanders to ensure service members abide by their orders, they must be able to effectuate punishment that is credible and transparent. Simultaneously, this punishment must be viewed as legitimate. A balanced military justice trinity weighing good order and discipline, due process, and the military justice system provides the commander with these tools. The current system, though, does not present this balance. The gradual increase of due process into the military justice system has rendered the court-martial an obsolete tool, and consequently commanders rarely utilize it. Thus, commanders lack the capability to deter service member misconduct . . . [O]nly by restoring the balance, specifically by scaling back the extra-constitutional due process rights afforded to accused service members, can commanders effectively combat the increase in service member misconduct.³⁶⁵

IV. A PROPOSED LIFELINE FOR ARTICLE 134 AND GOOD ORDER AND DISCIPLINE

Ironically, the term good order and discipline is itself apparently in a state of disorder, a victim of undisciplined usage. The military holds to the notion that it remains different from civilian society, requiring a greater emphasis on good order and discipline than civilian life demands.³⁶⁶ However, the military's inability (or refusal) to explain *why* and *how* it is different, and *what* exactly good order and discipline means today, imperils the very interests the military values.

This Article does not suggest that the concept of good order and discipline is unimportant. Anyone who has served in the armed forces understands the importance of good order and discipline, even if we do not exactly know what it looks like. The author has spent more than two decades in the military legal system defending commanders' legal space in which to maneuver, supporting their authority to take actions they believed furthered good order and discipline within their units. Make no mistake: whatever good order and discipline means, the concept *is* vitally important to an effective military force.

Like Justice Potter Stewart's famous statement on the difficulty of defining obscenity, some may have the sense of: "I know it when I see it."³⁶⁷ Perhaps the term in modern parlance is used too generically, too summarily, and too loosely, and perhaps some questions surrounding what good order and discipline means may need addressed. However, its underlying notions—the importance of command authority, of a climate in which members willingly submit themselves to lawful orders, and of trust and service before self—remain cornerstones of military service, even if it is sometimes difficult to thoroughly explain what the words "good order and discipline" mean.

None of this matters, however, if the military cannot discipline itself on its use of the good order and discipline term. If the military continues to be seen as using the term as a rhetorical catchphrase to oppose proposed policy changes, and if it refuses to explain what it means by the term, the consequences could be significant. The

³⁶⁵ Ghiotto, *supra* note 259, at 485–86.

³⁶⁶ Parker v. Levy, 417 U.S. 733, 748 (1974).

³⁶⁷ Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

immediate impact of this failure of definition has been a judicial and Congressional shrinking of the UCMJ's general article, particularly its clause prohibiting conduct prejudicial to good order and discipline.³⁶⁸ The military increasingly finds itself without one of its most important tools in preserving good order and discipline as the impact and use of Article 134 (particularly clause 1) continues to decline.³⁶⁹ The broader consequences could be more severe. If Congress, the media, interest groups, and the public continue to sense that "good order and discipline" is more a rhetorical smokescreen than a meaningful military concept, then the military will continue to lose public debates about policies it opposes. In the case of racial, gender, and sexual orientation integration, the shift to only a rhetorical smokescreen may not have been a bad development from a good order and discipline standpoint. The jury may still be out on military justice reform. The next change, whatever it may be, may not prove so innocuous.

The military desperately needs a workable definition of good order and discipline if it is to re-take this high ground. This Article offers the following definition to be employed in the *Manual for Courts-Martial* as well as service regulations. This definition is based on the best excerpts that discuss good order and discipline culled from a review of dozens of books, articles, public statements, and other sources. It also draws upon the more substantive discussion of the prejudicial to good order and discipline element applicable to adultery cases. The proposed definition is as follows:

Good order and discipline is the crucial component of military effectiveness. Military units require good order and discipline because military service requires a subjugation of self to the good of the whole to a degree not understood in civilian society, requiring service members to set aside their natural instincts of self-preservation and comfort-seeking behavior. The nature of military service requires good order and discipline to be instilled from the first day of military service and maintained at all times, whether in combat overseas or in peacetime operations in garrison.

Good order and discipline is a singular term, but it consists of two interrelated concepts. The first is good order. Good order means that the military unit functions in an organized military manner. Personnel understand their role in the organization and carry out their functions professionally and willingly. Members of the unit form a cohesive whole bound together out of a mutual sense of pride in the unit and a desire to have the unit succeed in its mission. Diversity of backgrounds, worldviews, and personal characteristics is welcomed and productive, with the non-negotiable condition that each member seeks to integrate his or her own unique characteristics into the larger organization for its good.

Military discipline is intelligent, willing, and positive obedience to the will of the leader, regardless of personal cost. Military discipline starts with the principle of command authority, in which a unit's leader owns both the

³⁶⁸ Nancy Montgomery, *Pentagon Proposes First Changes to UCMJ in 30 Years*, MILITARY.COM (Mar. 28, 2016), <http://www.military.com/daily-news/2016/03/28/pentagon-proposes-first-changes-to-ucmj-in-30-years.html>.

³⁶⁹ MCM, *supra* note 34, pt. IV, ¶¶ 61–113.

authority and the responsibility for enforcing military standards and instilling a sense of obedience. In combat, military discipline represents the self-control to unwaveringly focus on the mission regardless of personal hardship, danger, fear, physical exhaustion, or distraction, recognizing that only through each individual obeying the lawful orders of his or her superior can the unit succeed. During in-garrison operations, military discipline may be even more difficult but is no less important, requiring a constant emphasis on the military's core mission in order to maintain readiness for combat. Military discipline does not come naturally. It must constantly be instilled, cultivated, and reinforced.

Good order and discipline does not equate to blind loyalty to the individual leader. Personal bonds between leader and follower are natural in effective units, and in most instances, good order and discipline demands obedience to the commander or leader. However, good order and discipline requires loyalty to the Constitution and the larger organization above any individual, including the leader, in the rare situations where those interests clearly diverge.

The tools for instilling and maintaining good order and discipline include command presence and example, prompt and even-handed discipline for infractions, and recognition of exceptional performance. While changes in technology, demographics, and society may necessitate modifications in style, the underlying means and principles of leadership necessary to instill and maintain good order and discipline largely remain timeless.

To be punishable under Article 134 of the Uniform Code of Military Justice, acts must directly prejudice good order and discipline in an articulable fashion. Acts which remotely or indirectly prejudice good order and discipline may be dealt with through administrative action or other means, but not through punishment under this Code. Factors to consider in whether an act directly prejudices good order and discipline include:

- (1) Did the act raise an appreciable risk of others engaging in similar behavior?
- (2) Did the act negatively impact the unit's performance to any measurable extent?
- (3) Did the act negatively impact the authority, stature, or respect of unit leadership?
- (4) Did the act occur during the performance of the member's duty, on a military installation, or in the presence of other members of the unit?
- (5) Was the act known to other members of the unit?
- (6) Did the act occur after counseling or other actions taken regarding the same or similar conduct?
- (7) Were other unit members placed in danger as a result of the act?

This definition may or may not be complete or ideal. However, it represents a first step for discussion, and its mere existence represents a significant step over the nebulous state of understanding regarding good order and discipline today. When military leaders use the term, they should do so deliberately and with reference to this

definition, and they should be prepared to explain why the needs for good order and discipline weigh in favor of their position. Likewise, military lawyers, commanders, and courts should employ the definition and its factors to determine what actions truly prejudice good order and discipline to the extent that they become criminal.

Finally, little analysis exists regarding the state of good order and discipline in the modern military. Does the military today enjoy a high level of good order and discipline or is it facing a crisis of indiscipline? The military has no answer to this question because it has no way to measure good order and discipline. Commanders generally host a “status of discipline” meeting at regular intervals to discuss recent episodes of misconduct and how those instances were handled.³⁷⁰ However, these meetings typically offer just a glimpse into the level of order and discipline on an installation, highlighting more serious instances of misconduct. Measuring good order and discipline simply by the frequency of misconduct discovered and handled through the military justice system surely reflects an overly narrow view of good order and discipline. Should the military have some gauge on the level of good order and discipline, perhaps involving a combination of combat effectiveness, the prevalence of war crimes, court-martial and non-judicial punishment rates, unit climate surveys, and inspections? Particularly in the military culture, leaders set the tone by what they pay attention to, measure, and control.³⁷¹ Even with a definition of the term, the military cannot hope to achieve good order and discipline if it has no way of measuring it.

Defining good order and discipline, exercising discipline about use of the term consistent with the definition, and then measuring the level of order and discipline represent crucial steps toward reclaiming this core military principle. Without doing this hard work, the military risks the downward spiral of continued loss of the term’s rhetorical weight, which in turn may result in damage to good order and discipline.

V. CONCLUSION

To borrow an example from every military lawyer’s favorite movie, *A Few Good Men*’s Colonel Nathan Jessup famously accused the movie’s protagonist of using words like honor, code, and loyalty as a “punchline.”³⁷² Today, the military establishment seems bent on doing the same with good order and discipline. For much of history, good order and discipline was seen as an unquestionably vital component of military effectiveness, a unique requirement that separated the military from civilian society. When the military talked good order and discipline, people listened. Today, however, good order and discipline is increasingly seen not as a communication of a core military requirement, but as rhetorical camouflage. The immediate impact of this perception is a dwindling reach of the UCMJ’s once-powerful general article, particularly its criminalization of acts prejudicial to good order and discipline. The long-term effects may be far more serious.

It is time for military leaders to do some soul-searching and re-discover what exactly good order means in the modern military. The “soul” of the American military

³⁷⁰ VanLandingham, *supra* note 72, at 60.

³⁷¹ EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 246 (3d ed. 2004) (Listing, as the first primary mechanism for instilling organizational culture, “[w]hat leaders pay attention to, measure, and control . . .”).

³⁷² A FEW GOOD MEN (Sony Pictures, 1992).

is at stake; a disorderly, undisciplined approach to good order and discipline simply will not suffice.

